
(2016) 10 KL CK 0044
In the High Court Of Kerala
Case No : OP(C).No. 1929 of 2016 (O)

Babu	Vs	APPELLANT
Power Grid Corporation of India Limited		RESPONDENT

Date of Decision : 05-10-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9
Constitution of India, 1950 — Article 227

Citation : (2017) 1 ILRKerala 403 : (2017) 1 KerLJ 250

Hon'ble Judges : Mr. K. Ramakrishnan, J.

Bench : Single Bench

Advocate : Sri. Arun Babu, Advocate, for the Petitioner; Sri. Millu Dandapani, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Mr. K. Ramakrishnan, J. - O.P.(C).No.1929/2016 was filed against the order in IA.No.849/2016 in OP(Ele.) No.252/2012, OP(C).No.2080/2016 was filed against the order in I.A.No.870/2016 in OP(Ele.) No.157/2013, OP(C).No.2081/2016 was filed against the order in IA.No.875/2016 in OP(Ele.)No.159/2013, OP(C).No.2085/2016 was filed against the order in IA.No.843/2016 in OP(Ele.) No.124/2012, OP(C).No.2086/2016 was filed against the order in IA.No.871/2016 in OP(Ele.)No.215/2013, OP(C).No.2087/2016 was filed against the order in IA.No.844/2016 in OP(Ele.).No.128/2012, OP(C).No.2088/2016 was filed against the order in IA.No.837/2016 in OP(Ele.)No.126/2012, OP(C).No.2089/2016 was filed against the order in IA.No.869/2016 in OP(Ele.)No.155/2013, OP(C). No.2092/2016 was filed against the order in IA.No.838/2016 in OP (Ele.)No.486/2011, OP(C).No.2093/2016 was filed against the order in IA.No.872/2016 in OP(Ele.)No.265/2013, OP(C). No.2094/2016 was filed against the order in IA.No.850/2016 in OP (Ele.)No.27/2012, OP(C).No.2097/2016 was filed against the order in IA.No.841/2016 in OP(Ele.)No.118/2012 and OP(C). No.2344/2016 was filed against the order in IA.No.936/2016 in OP (Ele.) No.516/2011, all on the file of the First Additional

District Court, Kollam under Article 227 of the Constitution of India. Except the last case, OP(C).No.2344/2016, in all other cases the applications filed by the different petitioners in the respective cases were disposed of by the court below by a common order, while the application in the last case was disposed of by the same Judge by a separate order, but more or less on the same reasonings.

2. The petitioners in all these cases have filed the respective petitions for enhanced compensation for the trees cut from their properties and also for diminishing land value caused on account of the drawing of 400 KV electric transmission line from Thenkasi to Edamon. The respondent Corporation have conducted survey for the purpose of drawing the above line through the properties of the petitioners and others and earmarked the trees to be cut for that purpose on the basis of the survey conducted for the alignment of the line to be drawn including the erection of towers. For that purpose, the Deputy Tahasildar was deputed and mahazers have been prepared by the officials in respect of affected properties of each petitioners showing number of trees, its height and width and probable yield from those trees and copies of the mahazers were supplied to the land owners namely the petitioners and after conducting enquiry, they have passed awards fixing the compensation payable for the trees cut on various dates and the amounts were disbursed to the petitioners on different dates. The trees were cut and removed and thereafter the line was drawn thorough the properties. Dissatisfied with the quantum of compensation awarded by the authorities, the respective applications have been filed for enhancement of compensation under section 16(3) of the Indian Telegraph Act 12 of 1975 read with section 51 of Indian Electricity Act, Act 9 of 1910 claiming various enhanced amount. They have also unanimously contended in these petitions that the mahazers were not properly prepared by the officials. They have also contended that copies of mahazer were not served on them at the time when it was prepared. They were prepared from their office and their signature were obtained when they went to receive the compensation amount. The actual yield from the trees were not calculated by them. The diminishing land value caused on account of drawing of the line has not been taken into consideration. Further, on account of drawing of the line, the market value of the property has been decreased, thereby they will not fetch the amount which they were expected to fetch before drawing of the line for their properties. They have further contended that on account of the drawing of the line, it is difficult for them to cultivate the land and also it will not be possible for put in proper use in a profitable manner and the properties are situated in a highly commercially potential area with higher market value and on account of the drawing of the line, the same has been diminished. They also contended that on account of the drawing of the line, living in the houses situated in some of the properties is difficult and claimed enhanced compensation at various rates depending upon the number of trees cut and extent of land affected on account of the drawing of the line.

3. In all these cases, the respondent Corporation filed a detailed counter

statement contending that the allegations mentioned in the petitions are not correct and the authorities have properly assessed the number of trees, its yield etc and proper compensation has been awarded. They also contended that on account of the drawing of the line, no diminishing land value has been caused. They can use the land as before and no decrease in income will be caused on account of the drawing of the line. They can profitably use the land under the line and thereby the petitioners are not entitled to get the enhanced compensation and they prayed for dismissal of the application.

4. The petitioners have filed Ext.P2 application in all these cases for appointment of a commission to ascertain the following aspects:

i. to report the correct age and yield of the yielding trees cut and removed at the time when the mahazer was prepared either by comparing it with similar trees standing near the tress or adjacent property if not by collecting information from the petitioners and others.

ii. to take the measurement of the affected area of the property due to the drawing of the line and prepare a plan.

iii. to assess whether any building or cattle shed or other construction standing in adjacent to the line and to what extent the line affect the use of building by the petitioners.

iv. to assess whether any tower is situated in the property of the petitioners and measurement of the property covered by the tower.

v. to assess the potentiality of the property and market value of the similar properties situated in the nearby areas.

vi. note other things pointed out by the petitioners necessary for proper adjudication of the case.

5. In OP(C).No.2344/2016, the following things were wanted to be noted by the commissioner.

a. To note the details of trees cut and removed and the trees standing nearby the line.

b. To ascertain the annual yield and the total loss of the rubber trees cut and removed by comparing the yield of existing trees near the line.

c. To note the yield of all other trees cut and removed separately.

d. To note the total loss of all other non yielding trees cut and removed.

e. To note specifically through which part of the property the line is drawn.

f. To note the locational importance of the property.

g. To note whether any tower is installed in the property and if so, approximate area taken for installing the tower.

h. To note whether any residential or non residential building is situated in the property and to note whether the line is drawn over and near the building.

i. To note the inconvenience caused to the property, building, petitioners and their family by the drawing of the line

j. Such other matters that may be asked to note by the petitioners at the time of visit of the commissioner.

6. The respondent Corporation filed a detailed counter to all these petitions contending that trees were already cut and removed and lines were drawn and mahaser was prepared somewhere in the year 2008, 2009 and 2010 and trees were cut in the year 2009 and 2010 and compensation was awarded and received by the parties in the year 2009, 2010 and 2011 and the petitions were filed somewhere in the year 2011, 2012 and 2013 and the commission applications were filed only on 21.5.2016. There will not be any trees available for the purpose of assessing the yield. Further, the yield of the trees were assessed by the authorities as on the date of preparation of the mahazer and compensation was awarded on that basis. Further, after a long lapse of more than 6 years of cutting of the trees taking out a commission will not help the court to arrive at the actual position which existed at the time of cutting of the trees. The commissioner is not entitled to collect evidence as requested in the petition. The petitioners can adduce evidence regarding this aspect and the court can consider those things and pass appropriate orders at the time of trial and there is no necessity for appointment of a commissioner. The valuation statement prepared by the authorities of the Corporation will show the number of trees cut, its yield and the manner in which compensation was assessed. Further, a plan will be prepared by the authorities regarding the alignment of the line to be drawn and locations of the tower and that will show the actual extent covered by the line and the tower and for that purpose, no commission is required. Further, regarding the market value, the evidence of the commissioner is not helpful and only it is a hearsay evidence which is not admissible in evidence and the petitioners can produce documentary evidence to prove these facts. So they prayed for dismissal of these petitions.

7. No oral evidence was adduced on either side and the court below after considering the submissions of both the counsel dismissed the applications filed by the petitioners by a common order in all cases but last one by a separate order, the last case. The court below had given the same reasonings in all the impugned orders for dismissing the applications as follows:

a. No purpose will be served by taking out a commission after the lapse of long period of cutting and removing of trees and mahazers have been prepared by the officials of the Corporation and their mahazers can be relied on by the court as it has to be presumed to be done in the correct manner in view of the presumption available under section 114(e) of the Indian Evidence Act.

b. As regards the importance of the locality and area affected, the court below

observed that those things can be proved by the petitioners by adducing oral evidence and for that purpose, there is no necessity for appointment of a commissioner.

c. The court below also observed that all these petitions were filed belatedly and that also can be taken as a ground for dismissal of the petitions.

8. Aggrieved by the above impugned orders, the above petitions has been filed by the respective petitioners challenging the same under Article 227 of the Constitution of India.

9. Since the question to be decided in all these cases are same and same reasons have been given by the court below for dismissing the applications, this court felt all these petitions can be disposed of by a common judgment.

10. Heard Sri. Arun Babu, learned counsel appearing for the petitioners and Sri. K.P Dandapani, senior counsel appearing for the respondent.

11. Learned counsel for the petitioners submitted that in order to ascertain the actual loss caused, without taking out a commission it is not possible for the petitioners to prove the same by adducing oral evidence alone. Under Order 26, Rule 9 of the Code of Civil Procedure, commission can be appointed to ascertain the market value of the property and also best evidence to be collected for the purpose of adjudicating the case in an effective manner and such an opportunity should not be denied to the petitioners. The petitioners have a case that the mahazers were not prepared in their presence and the nature of trees cut, its yield etc were not properly shown and that can be considered by the commissioner on a comparison of the remaining trees available in the property. Unless the area affected is ascertained, the compensation payable under the head the diminishment of land value could not be properly assessed for which materials will have to be provided to the court which can be done only by taking out a commission. Belated application is not a ground for rejecting the applications, if it is required for proper adjudication of the case. He had relied on the decisions reported in *Rajesh R. Kartha v. K.A. Ismail* (2015 (4) KHC 408) and *Payani Achuthan v. Chemballikundu Harijan Fisheries Devlp. Coop. Society* (1996 KHC 234) in support of his case.

12. On the other hand, senior counsel appearing for the respondent Corporation submitted that the trees were cut and removed in the year 2009, 2010 and compensation was paid in the year 2009, 2010 and 2011 and applications were filed nearly after two years of receipt of the compensation amount. Competent officials were deputed by the Corporation for preparing mahazers and mahazers have been prepared after giving notice to the affected parties through whose property the line was proposed to be drawn and after preparation of the mahazers of the trees to be cut for this purpose, a copy of the same has been handed over to the respective owners of the property and only thereafter, after conducting an enquiry, proper and just compensation has been awarded. The property has not been acquired by the Corporation and the properties are still in

the enjoyment of the respective owners of the property. After a lapse of long period, no purpose will be served by sending a commission to ascertain the yield and nature of the trees cut from the property. Further, there is no loss of utility of land caused on account of the drawing of the line. Short term cultivation can be possible even under the line and also under the tower and thereby no diminishing land value has been caused. So according to the learned counsel, the court below had given cogent and just reasons for dismissing the applications permitting the petitioners to adduce oral evidence on these aspects. Even if, this court has a different view, powers of this court under Article 227 of the Constitution of India is limited and unless the decision of the court below is perverse and illegal, the same cannot be interfered by this court under Article 227 of the Constitution of India. He had relied on the decision reported in *Sumer Chand Jain v. Vishnu Bhagwan Mangla* (2006 (2) RCR (Civil) 445) and *Union of India v. M/s. Kripal Industries* (AIR 1998 Rajasthan 224) in support of his case.

13. It is an admitted fact that 400 KV transmission line from Thenkasi to Edamon was drawn by the respondent Corporation and for the purpose of alignment of the line, survey was conducted and the line was proposed to be drawn through the properties of the petitioners and others. It is also an admitted fact that for the purpose of drawing the line, towers were also established and through some of the properties of the petitioners line alone was drawn and in some properties apart from drawing the line, tower was also established. It is also an admitted fact that for the purpose of drawing the line, trees to be cut were marked by the officials of the respondent Corporation and a mahazer was prepared and later compensation was assessed and it was paid to them. Since the petitioners were not satisfied with the amount awarded, they have filed the application for enhanced compensation.

14. The chart showing the name of the parties and the property affected according to the Corporation, date of cutting, date of payment of compensation, date of filing of the application have been furnished by the senior counsel appearing for the respondent Corporation as follows:

SI. No. OP(C) No. & Date Year of notification Extent of property affected Trees numbered Trees cutting order issued Amount received and date Tree cut on OP (Ele)date Commission on application date Order in commission application

1 2094/2016 dated 23.8.16 2008 20cents 13.10.2009 28.07.2010 Rs.50936/- dated 30.08.2010 18.10.2010 03/10/12 21.05.2016 14.07.2016

2 2093/2016 2008 1 Acre 14.10.2010 28.10.2010 Rs.167197 dated 17.06.2011 18.11.2010 03/10/12 21.05.2016 14.07.2016

3 2092/2016 2008 4cents 18.4.2008 07/07/10 Rs.4867 dated 11.6.2010 18.11.2010 03/01/12 21.05.2016 14.7.2016

4 2089/2016 2008 10Cent 21.4.2008 10/03/10 Rs.81810 dated 11.6.2010 18.11.2010 03/10/12 21.05.2016 14.07.2016

5 2088/2016 2008 69Cent 27.4.2008 17.6.2010 Rs.63781 dated 2.7.2010
18.11.2010 03/10/12 21.05.2016 14.07.2016

6 2087/2016 2008 8 cents 21.12.2009 01/02/10 Rs.14634 dated 7.10.10
18.11.2010 03/10/12 21.05.2016 14.7.2016

7 2088/2016 2008 30Cent 15.12.2009 24.5.10 Rs.29180 dated 13.8.10
18.11.2010 03/10/12 21.05.2016 14.7.2016

8 2085/2016 2008 2 Acre 25.06.2008 17.03.2010 Rs.138783 dated
15.06.10 18.11.2010 03/01/12 21.05.2016 14.07.2016

9 2081/2016 2008 27Cent 26.4.2008 12/06/10 Rs.45049 dated 02.07.10
18.11.2010 03/10/12 21.05.2016 14.7.2016

10 2097/2016 2008 50Cent 23.6.2008 27.6.2008 Rs.138582 dated
06.06.09 18.11.2010 03/10/12 21.05.2016 14.07.2016

11 1929/2016 2008 3.5 Cent 21.04.2008 18.11.10 Rs.2656 dated 10.03.11
18.11.2010 03/10/12 21.05.2016 14.7.2016

12 2080/2016 2008 10cent 02/07/10 08/06/11 Rs.9700 dated 19.07.11
18.11.2010 03/10/12 21.05.2016 14.7.2016

15. It is true that trees were cut in the during 2008, 2009 and 2010 and compensation was awarded to the parties before 2009, 2010 and 2011 and these petitions were filed in the year 2012 and 2013. It is settled law that, apart from the value of the trees cut, parties are entitled to get compensation for diminish in land value as well. The parameters to be considered for assessing compensation under the head diminish in land value has been considered by the Apex Court in *K.S.E.B v. Livisha* (2007 (3) KLT 1), in which it has been held as follows:

"The situs of the land, the distance between the high voltage electricity line laid there over, the extent of the line thereon as also the fact as to whether the high voltage line passes over a small track of and or through the middle of the land and other similar relevant factors in our opinion would be determinative. The value of the land would also be a relevant factor. The owner of the land furthermore, in a given situation may lose his substantive right to use the property for the purpose for which the same was meant to be used. So far as the compensation in relation to fruit bearing trees are concerned the same would also depend upon the facts and circumstances of each case."

16. The same view has been reiterated in the decisions reported in *Kapur Singh Mistry v. Financial Commission & Revenue Secretary to Govt. of Punjab & Ors.* (1995 supp.(2) SCC 635), *State of Haryana v. Gurcharan Singh & Anr.* (1955 Supp. (2)SCC 637) and *Airports Authority of India v. Satyagopal Roy & Ors.* (2002 (3) SCC 527). So it is clear from the above decisions that the location of the property, area affected by the line drawn, the purpose for which the land was put to use by the owner of the land prior to the drawing of the line, the affection of the land on account of the drawing of the line, to the extent it affected the

right of the owner to put it for use in a better manner, any other inconvenience caused on account of the drawing of the line, the location of the line drawn, how far it has affected its utility and also the market value of the property are all relevant factors to be considered by the court for the purpose of awarding compensation under the head loss of diminish in land value. Admittedly the loss of diminish in value has not been taken into account by the officials of the Corporation while awarding compensation and the compensation was awarded on the basis of the improvements from the trees cut by applying necessary multiplier. In order to ascertain these facts, there must be some materials available before the court which has to be supplied by the petitioners, who are claiming enhanced compensation for the loss sustained by them on account of the drawing of the line through their properties.

17. The reasonings given by the court below for dismissing the application appear to be not sustainable as the reasons stated are: (i) it is highly belated (ii) the revenue officials have prepared the mahazer after giving notice to the parties and petitioners can adduce oral and documentary evidence regarding these aspects. It is true that since trees in the year 2008 and 2009 and commission application was filed in the year 2016, the trees which were cut would not be available for the commissioner to ascertain its nature. If there are other similar trees available in the land like coconut trees and rubber trees, the commissioner can compare those trees for the purpose of ascertaining its fertility and nature of yield that is being obtained from those trees and relate back to the date of cutting by giving some concession to the age of the trees at the relevant time. Whether that is reliable or not, is a matter to be considered by the court at the time of appreciation of the commissioner's report on this aspect. The commissioner is not expected to compare the trees in the neighbouring land with the land through which the line was drawn for this purpose as that may depend upon so many other factors regarding the manner in which the trees were maintained by the owners of the land and the nature and variety of the trees planted etc. So the commissioner can compare the remaining trees available in the same property for the purpose of assessing the yield from the trees cut and the possibility of obtaining almost similar yield from the trees cut can be considered by the court at the time of trial. As regards the value of the commodity and dropping etc also, the court can rely on the oral evidence of the parties, for which purpose it is not necessary that the report of the commissioner will have to be relied on.

18. Order 26, Rule 9 of the Code of Civil Procedure reads as follows:

" Order 26, Rule 9 . Commissions to make local investigations:- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mense profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules".

19. It is seen from the provision itself that commissioner can be deputed by the court for local inspection for the purpose of ascertaining the market value of the property. That can be possible by the commissioner noting the situs and location of the property and its importance including commercial potentiality etc that can be possible only by taking out a commission. The commissioner can ascertain as to the location of the property as on the date of cutting and not at the time when he inspected the property. The nature of the line drawn, extent of the land covered by the drawing of the line, the extent of the land affected on account of the drawing of the line etc also can be ascertained only by deputing an advocate commissioner with the help of a surveyor to measure out the land with a plan, so that, it will be helpful for the court to ascertain the area covered by the line and the market value of the land and other materials required for assessing the compensation for diminish in land value. The oral evidence of the interested testimonies of the petitioners alone will not be sufficient for that purpose as evidentiary value of such witnesses will be very limited and it is not necessary that the court will have to rely on the same as well. But if the commissioner's report is available on these aspects, the court can compare the same with the oral evidence and arrive at its own conclusion on this aspect.

20. Further, in the decision reported in *John v. Kamarunnissa* (1987 (2) KLT 249), it has been held that:

"O.XXVI Rule 9 C.P.C enables the Court to depute a commission for local investigation whenever it considers that it is necessary for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount of any mesne profits or damages of annual net profits".

21. The same view has been reiterated in the decision reported in *Ambrose v. Yesudas* (2009 (2) KLT 255).

22. The court below had dismissed the application for issue of commission on the ground that the mahaser and plan prepared by the officials will have to be deemed to have to be done in a proper manner invoking the presumption available under section 114(e) of the Evidence Act regarding their official act. But court has forgotten the fact that it is a rebuttable presumption. That can be rebutted by the person who wants to challenge the same is by adducing strong evidence and the best evidence that to be possible by the parties who want to challenge the same by taking out a commission to disprove the facts mentioned in the documents prepared by the official witnesses. It is also settled law that mere delay in taking out a commission alone is not a ground to reject the application, if the matters sought to be elicited through commissioner's inspection if it is required for the purpose of proper adjudication of the case.

23. There is no dispute regarding the proposition laid down in the decisions reported in *Sumer Chand Jain v. Vishnu Bhagwan Mangla* (2006 (2) RCR (Civil)

445) and Union of India v. M/s. Kripal Industries (AIR 1998 Rajasthan 224) relied on by the learned senior counsel for the respondent. In the earlier decision, the Punjab - Haryana High court has considered the question of power of the High Court under Article 227 of the Constitution of India. There is no dispute regarding the proposition of law that merely because this court can substitute its different views is not a ground for setting aside the order passed by the court below. The power under Article 227 is not wider than the power under section 115 of the Code of Civil Procedure namely the revisional jurisdiction. But at the same time if the court is satisfied that the court below had not applied the correct legal position and the order passed is unsustainable for the reasons known to law, then the power under Article 227 can be invoked by the High Court to set aright the defect/mistake committed by the court below. The dictum laid down in the proposition of law laid down in Union of India v. M/s. Kripal Industries (AIR 1998 Rajasthan 224), is also not in dispute because that was a case where commissioner was sought to be appointed for the purpose of ascertaining who is in possession of the property and the Rajasthan High Court has held that commissioner is not competent to say about the possession of the property. It may be mentioned here that it is settled law that the commissioner is not expected to conduct a roaming enquiry but he is only expected to note the things found by him in the place at the time of inspection which will be helpful for the court to adjudicate the real dispute in the list. He is not expected to collect evidence by conducting a local enquiry as well unless he has been deputed for that purpose by this court. So there is no dispute regarding the proposition of law laid down in the above decisions as well and that is not appealable with the facts of these cases.

24. So in view of the discussions made above, this court is of the view that the reasons stated by the court below for dismissing the application for appointment of a commissioner is unsustainable in law as the best evidence to be adduced is being denied to the petitioners by the court below which in fact is required for proper adjudication of the case as well. So under such circumstances, the orders passed by the court below dismissing the application are unsustainable in law and the same is liable to be set aside. The above petitions are allowed by setting aside the order passed by the court below and those applications are allowed. The court below is directed to appoint an advocate commissioner as far as possible the same commissioner in all these cases and direct the commissioner to file separate report and plan in respect of each property belonging to the petitioners and he can also be assisted by a panel surveyor available in the court in stead of going for taluk surveyor or district surveyor to avoid delay and court below is directed to fix the remuneration for the commissioner in each case separately and also the remuneration of the panel surveyor to be appointed for this purpose. The commissioner can be directed to prepare a report and plan with the help of surveyor regarding the things mentioned above taking note the principles laid down by this court which is required for the proper adjudication of the case in the matter and also on the basis of the work memo, if any, submitted

by both the parties.

Registry is directed to communicate a copy of this judgment to the concerned court immediately. Considering the fact that the case is of the year 2010 and 2011, the court below is directed to expedite the disposal of the cases at the earliest after getting the commissioner's report.