

(2012) 09 KL CK 0064

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 35921 of 2010 (M)

Jayan P.S. and Chandran P.T.

APPELLANT

Vs

Madakkathara Grama Panchayath and Others

RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Panchayat Raj Act, 1994 — Section 169, 170
Land Acquisition Act, 1894 — Section 16

Citation : (2012) 09 KL CK 0064

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : V. Philip Mathews, for the Appellant; M. Anil Kumar, for R1, Smt. Preethi K. Purushothaman, Sri. Asok M. Cheriyan, SC, KSEB, Sri. Pulikool Abubacker, SC, KSEB by Sri. P.P. Thajudeen, SC, K.S.E.B for R3 and R4 and Smt. Lilly Leslie, Government Pleader for R5 to R8, for the Respondent

Final Decision : Dismissed

Judgement

Justice Thomas P. Joseph

1. This petition is filed under Article 226 of the Constitution of India, seeking various reliefs including the issue of a writ of mandamus or other appropriate writ, order or direction commanding the respondents to take immediate necessary action to remove the obstruction created on the road starting from Pandiparambu - Kachithodu Panchayat road and joining the canal bund road in Madakkathara Grama Panchayat and take necessary action to ensure that the said road is freely available to the petitioners for their use. According to the petitioners who claimed to be the residents of the area, themselves and other people of the locality are using the above said road having length of 1094 links and width of 20 links. Petitioners and others were using the said road for several decades for ingress and egress to their properties. The said road belongs to and is vested with the first respondent, the Grama Panchayat. While so, the 3rd respondent, State Electricity Board has enclosed the said road on 27.11.2010.

Hence the write petition.

2. The 2nd respondent, the Secretary of first respondent -Grama Panchayat has filed a counter affidavit on behalf of respondents 1 and 2. In that counter affidavit it is contended that the second respondent inspected the premises of KSEB and found that there was remains of a road which was seen blocked in two directions. The Asset Register of the first respondent reveals that there is no road in existence to invoke Sections 169 and 170 of the Kerala Panchayat Raj Act, 1994 (for short "the Act"). One Abraham George filed O.S. No. 386 of 1991 raising some contentions. That suit was dismissed and a judgment was passed in favour of respondents 3 and 4. The appeal arising therefrom was dismissed. That matter is pending consideration in this Court in R.S.A. No. 1376 of 2010.

3. The 6th respondent has filed separate counter. There, it is contended that following dismissal of O.S. No. 386 of 1991 and the appeal arising therefrom, the Assistant Engineer, Transmission Department (K.S.E.B) submitted a representation on 18.11.2010 seeking adequate police protection to ensure that no law and order situation arises at the time of fencing the land which belonged to the K.S.E.B. The police has accordingly granted protection.

4. The 8th respondent has filed a statement claiming that ownership of the plot having an extent of 43.0997 hectares in survey No. 272/1 and part of Madakkathara village is vested with the K.S.E.B as per village records and the said land is in the actual possession of the K.S.E.B. There is no public road through the said land. A road having width of 4 meters and length of 218.88 meters passes through the land connecting Pandiparambu - Kachithodu road to Peechi Irrigation Kanal Bund road which is used by the petitioners and neighbours was closed by the K.S.E.B authorities on 27.11.2010 by fencing the land which is in their ownership to avoid encroachment.

5. The learned Counsel for petitioners contends that notwithstanding the assertion of respondents 1 and 2 that the Road Register maintained by the first respondent does not reveal that the road referred in the writ petition is vested with the first respondent, it is open to this Court to find in favour of vesting of the said road with the first respondent. The learned Counsel, placing reliance on the decisions in Lilly Vs. Secretary to Government 2007 (1) KLT 567 has contended that no formal notification transferring ownership of public road to the Panchayat is required. Learned Counsel also reads from page 901 of Katiyar on Law of Easements and License that public rights of way which are also known as high way rights either created by a statute or arise out of dedication by the owner of the public. It is argued that there is ample evidence to show that a public road was created by dedication and as such a separate notification transferring the ownership of the road to the local authority is not required. It is also argued that even on the face of an acquisition that right will not be closed.

6. The learned Counsel for contesting respondents argues that there is no evidence to show that the road in question is vested with the first respondent.

There is also no evidence to show that the disputed road was dedicated by the owner of the said road to the public. It is pointed out by the learned Counsel that concerning title over the disputed property, a suit has already been instituted as O.S. No. 386 of 1991 and a second appeal therefrom is pending decision of this Court.

7. It would appear that according to the contesting respondent, the property comprised in survey No. 272/1 of Madakkathara Village was also acquired by the State Government for the K.S.E.B. and based on that acquisition following the dismissal of the suit, the K.S.E.B. has enclosed the property acquired to give security for the Sub Station which is already established in the property acquired.

8. It is not disputed by the learned Counsel for petitioners that in RSA No. 1376 of 2010, contention raised by the appellant therein who claimed to be the owner of 22 cents in survey No. 272/1 through which the disputed road allegedly passes is that the said property belongs to him as per a partition deed. His further contention is that the said property is not part of property acquired by the State Government for the KSEB.

9. In other words, question whether the disputed property belongs to the appellant in R.S.A. No. 1376 of 2010 (who is not made a party to this writ petition) or is part of property acquired is a matter which is to be decided in R.S.A. No. 1376 of 2010.

10. u/s 62 of the Kerala Panchayat Act, 1960 (which remained in force on the date of the alleged acquisition), it is not merely the management of public road that is vested W.P.(C). No. 35921 of 2010 :- 6 :-with the Panchayat but, the said provision shows that ownership of the road will also stand transferred to the Panchayat. In other words, by Sec. 62 of the said Act, there will be an automatic transfer of ownership of public road and its vesting with the local authority. Similar provisions are contained in Section 170 of the Act as well. It is in the light of the above that this Court in Lilly Vs. Secretary to Government has held that separate notification (transfer of ownership and vesting) is not required. Basically, there must be a transfer and vesting of public road to the local authority. In this case, stand of respondents 1 and 2 is that there is no such transfer or vesting of disputed road with the first respondent. No document is produced to show any such vesting or that at any point of time, respondents 1 and 2 have exercised right or control over the disputed road. In the light of the above, petitioners cannot say that the disputed road stands transferred to and vested with the first respondent.

11. I must also notice that as regards ownership of the land in question and as to whether acquisition by the State Government takes in the disputed property also, a dispute is pending decision in R.S.A. No. 1376 of 2010. In that situation, it is not open to this Court to issue any direction as prayed for in this writ petition. Yet another argument the learned Counsel has advanced is that by dedication, right of user of the public road could be conferred on the public. If the argument

of the contesting respondent that the property was acquired by the State Government for the use of K.S.E.B is accepted, then I must find that in view of Sec. 16 of the Land Acquisition Act, the acquisition is free of all "encumbrance" which includes a right to pass through the property as well. It is difficult to accept the contention of petitioners that in a sensitively important area like the Sub station of the Electricity Board, notwithstanding that there is an acquisition by the Government for and on behalf of the State Electricity Board, the public should have a right of access even affecting security of the sub station. That is why a provision is made in Sec. 16 of the Land Acquisition Act that the acquisition will be free of all encumbrance which should take in the right claimed by the petitioners as well. In view of the above and in view of the disputed question I have already referred to above pending decision in the RSA which are not required to be adjudicated in a proceeding under Article 226 of the constitution I am inclined to think that petitioners cannot claim any relief as prayed in this writ petition.

The writ petition is therefore dismissed. No cost.