
(2012) 02 KL CK 0181
In the High Court Of Kerala
Case No : F.A.O. No. 141 of 2011

Kunjayyan and Others

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 43 Rule 1, Order 43 Rule 1(c), Order 43 Rule 1(w), Order 9 Rule 13
Constitution of India, 1950 — Article 227
Land Acquisition Act, 1894 — Section 18, 22, 53, 54

Citation : (2012) 1 KLJ 774

Hon'ble Judges : V. Ramkumar, J;K. Harilal, J

Bench : Division Bench

Advocate : Johnson Gomez and S. Biju, for the Appellant; E.K. Nandakumar, P. Benny Thomas, K. John Mathai, P. Gopinath, Thushara James and Githesh (GP), for the Respondent

Final Decision : Allowed

Judgement

V. Ramkumar, J.—In these appeals filed under Order XLIII Rule 1(c) C.P.C. the appellants challenge the separate orders passed by the Land Acquisition Reference Court namely the court of the Subordinate Judge, Koliyam, dismissing the restoration petitions preferred against the orders dismissing for default the reference applications filed by some of the claimants.

THE FACTUAL MATRIX

The appellants in F.A.O. 141/2011 represent claimants 2 to 4, 6 and 7 in L.A.R. 129 of 1993. The appellants in F.A.O. No. 193/2011 represent claimants 1 and 2 in L.A.R. 138 of 1991. In both the L.A.R. cases certain parcels of land belonging to the aforesaid claimants and situated in Panmana Village of Karunagappally Taluk were compulsorily acquired by the State on the requisition made by the 2 respondent, namely, the Indian Rare Earths Limited (" I.R.E. Ltd." for short) Chavara, Kollam. Dissatisfied with the compensation given under separate

awards passed by the Land Acquisition Collector (the Collector" for short) the aforementioned claimants preferred applications before the Collector under Sec. 18 of the Land Acquisition Act, 1894, seeking a reference of their claim for enhanced compensation for determination by the Court It was those applications which led to the registration of L.A.R. Nos. 138/1991 and 129 /1993 before the Sub Court, Kollam ("the reference Court" for short). On 17-2-1999 L.A.R. 138/1991 was dismissed for default by the reference court on the ground that claimants 1 & 2 did not file statements and were called absent and they had no representation. On 16-09-1999 L.A.R. 129/1993 was also dismissed for default as against claimants 2, 3, 4, 6 & 7 on grounds similar to those mentioned in L.A.R. 138/1991. LA. No. 894/2006 was filed under Order IX Rule 9 C.P.C. by the aggrieved claimants in L.A.R. 129/1993 seeking restoration of their reference dismissed for default They also filed I.A. 895/2006 seeking to condone the delay of 2326 days in filing I.A. 894/2006. Similarly, I.A. 468/2006 was filed under Order DC Rule 9 C.P.C. by the aggrieved claimants in L.A.R. 138/91 seeking restoration of the reference. They also filed I.A. 468 (a) /2006 for condoning the delay of 2837 days in filing I.A. 468/2006. I.A. No. 895/2006 was dismissed on 23-7-2007 holding inter alia that the petitioners therein did not satisfy the Court that they were prevented by sufficient cause from appearing before the Court. Consequently, LA. 895/2006 was also dismissed. Same was the fete of I.A. 468 (a)/2006 and I.A. 468/2006 both of which were dismissed on 3-10-2007. Even though the two sets of claimants preferred petitions seeking review of the aforesaid orders, the same were also dismissed by the Reference Court It is thereafter that the present appeals have been filed representing the two sets of claimants some of whom are now no more.

THESE APPEALS

2. These appeals are directed against the orders passed by the Reference Court in the year 2007 rejecting as time barred the restoration petitions filed by the claimants seeking to restore the aforementioned land acquisition reference cases which were dismissed for default in the year 1999. The delay in filing these appeals was condoned by separate orders passed by this Court after hearing both sides.

3. We heard Advocate Sri. Johnson Gomez the learned counsel appearing for the appellants, Advocate Smt. Thushara James the learned counsel appearing for the requisitioning authority (I.R.E. Ltd.) and Advocate Sri. R. Githesh, the learned Government Pleader representing the State.

OPPOSITION BY THE REQUISITIONING AUTHORITY

4. Adv. Smt Thushara James, the learned counsel appearing for I.R.E. Ltd., (the requisitioning authority) made the following submissions before us opposing these appeals :-

Even if the orders dismissing the L.A.R. cases for default and the impugned orders are unsustainable, the appellants were guilty of gross laches and they had

subsequently filed applications for reviewing the impugned orders and those applications were also dismissed by the reference court. The orders dismissing the review petitions were not challenged by the appellants and those orders have become final. With those orders staring at the appellants, it is impermissible for this Court to allow the present appeals. It is true that the appellants had the option of filing applications under Order IX Rule 9 C.P.C. as also riling appeals. But, once the appellants had chosen to exhaust one remedy, they cannot invoke the other remedy as well. Hence these the appeals which are misconceived may be dismissed.

THE STAND OF THE GOVERNMENT

5. Advocate Sri. P. Githesh, the learned Government Pleader submitted as follows:-

The Government have filed counter affidavits in these appeals alleging that the petitions filed by the appellant were grossly out of time and seeking dismissal of the appeals. But in the light of the verdict of a Division Bench of this Court in *Shahida Beevi v. State of Kerala - 2008 (1) KLT 206*" me orders passed by the Reference Court dismissing the LAR cases for default, are indefensible.

JUDICIAL EVALUATION

6. We are afraid that we find ourselves unable to agree with the above submissions made in opposition to these appeals.

A. The Reference Court has no power to dismiss the reference for default or close the reference.

Non-participation of the claimant when the matter is taken up for hearing by the Reference Court does not justify a dismissal of the case for default The Court has to answer the reference by passing an award. If any of the claimants does not participate in the inquiry before the reference court, he or she stands the risk of an award being passed detrimental to his or her interest. The contrary view taken by a Full Bench of the High Court of Delhi in *Ram Piari and Others Vs. The Union of India*, is no more good law in view of *Khazan Singh Vs. Union of India*, . See also *Krishna Pillai v. State of Kerala - 1988 (2) KLT 898* and *Joseph v. Government of Kerala -1991 (2) KLT 69 (DB)*. Once the matter is referred to the reference Court under Sec. 18 of the Land Acquisition Act, 1894, that Court also cannot close the reference. It has to pass an award on merits. (See *Vilasini Amma v. State of Kerala - 2007 (3) KLT (SN) 92 (DB)*). It is the duty and power of the reference court to determine just and adequate compensation on relevant facts and the law applicable by sitting in the armchair of a prudent purchaser in open market (See *Rajmani Vs. Collector, Raipur*,).

B. Claimant is in the position of a plaintiff and the Land Acquisition Collector is in the position of a defendant

7. Upon service of notice on the claimant or interested person he is treated as

the plaintiff and the land acquisition collector is treated as the defendant for conducting the proceedings as envisaged under Sec. 22 of the Land Acquisition Act. They are entitled to be represented by counsel. On receipt of the application, it is the duty of the claimant who seeks higher compensation to adduce evidence and prove in court that the compensation awarded by the collector was inadequate and that the acquired lands were fetching a higher value which should be reflected in the award for just and adequate compensation. The burden is always upon the claimant to prove the same. The Land Acquisition Collector can rebut the evidence adduced by the claimant/interested person. (Vide Rajmani (supra)).

C. Where the reference is dismissed for default the remedy is either a petition for restoration or an appeal

8. The burden is always on the claimant to prove that the compensation awarded by the Land Acquisition Collector was inadequate and the acquired lands would fetch a higher value by way of adequate compensation. Ultimately it is the duty of the Reference Court to determine just and adequate compensation and answer the reference accordingly. The reference court cannot abdicate its statutory function of answering the reference by dismissing the same for default for the reason that the claimant on whom the burden lies, has remained absent But in a case where the reference court dismisses for default the reference, a petition for restoration of the same under Sec. 151 C.P.C. (Jogi Sahu and Another Vs. Collector, Cuttack, which was approved in Khazan Singh Vs. Union of India, or under Sec. 151 read with Order IX Rule 9 C.P.C. [Vide Pathummal v. State of Kerala - ILR 1974 (2) Ker 30; Rajmani and Shahida Beevi (supra)] or an appeal under Sec. 54 of the Land Acquisition Act will lie. (Vide Pathummal, Rajmani and Shahida Beevi (supra). Incidentally, Joseph v. Government of Kerala-1991 (2) KLT 69 to the extent it holds that a petition under Order IX Rule 9 C.P.C. will not lie, stands impliedly overruled by Rajmani Vs. Collector, Raipur, . When the Court does not possess the jurisdiction to dismiss a reference for default, it should naturally have the power to rectify the mistake and remedy the injustice. Even if the aggrieved party approaches the same Court by invoking a wrong provision of law, his application should not be thrown out by the Reference Court on the ground that such an application is not maintainable. Adversarial system of administration of justice does not mean that the opposite party should oppose tooth and nail every petition filed by a party even if the claim of such party is just and equitable. The court's concern also should be to undo the wrong done to the party and not to allow technicalities to triumph and heartlessly decline jurisdiction. It will be poor solace to the aggrieved party to be told that he should approach a superior forum for redressal of his grievance. Even though an order dismissing a suit for default is not a "decree" within the meaning of Sec. 2 (2) C.P.C. and is, therefore, not appealable under Sec. 96 read with Order XLI Rule 1 C.P.C, Courts have held that an order dismissing a reference for default is appealable under Sec. 54 of the Land Acquisition Act (Vide Rajmani and Shahida Beevi (supra). That is presumably because a dismissal for default of a reference

also amounts to an award which is appealable under Sec. 54 of the Land Acquisition Act. In a case where the claimant is set ex parte and the reference is dismissed for default, it is not an ex parte award so as to justify the filing of an application under Order DC Rule 13 C.P.C. It is also a case of dismissal for default pure and simple and the remedy may be an application under Order IX Rule 9 or Order DC Rule 9 read with Sec. 151 C.P.C. or an appeal under Sec. 54 of the Land Acquisition Act [Vide Rajmani and Shahida Beevi (supra)]. Even if the claimant wrongly files an application under Order DC Rule 13 C.P.C., the same can be treated as one filed under Order DC Rule 9 read with Sec. 151 C.P.C. Vide Rajmani and Shahida Beevi (supra). In a case where the remedy by way of appeal were to be invoked by the claimant the appellate court may not be in a position to decide the correctness of the award except again to fall back upon the question whether the appellant/claimant was properly served and whether he was prevented by sufficient cause from appearing before the reference court (Vide Rajmani (supra)).

D. There is no obligation for the claimant to file a written statement before the reference court.

9. Besides the absence of the claimants the dismissal for default of the two references was based on the failure on the part of the claimants to file statements before the reference Court. Neither the Land Acquisition Act nor the Civil Rules of Practice, Kerala, 1971, insist on the claimant to file any statement before the Court. Section 53 of the Land Acquisition Act makes the Code of Civil Procedure, 1908 applicable to all proceedings before the reference Court. Rule 378 (2) of the Kerala Civil Rules of Practice makes the procedure in the C.P.C. in relation to original suits applicable to the trial of land acquisition references as well. Sub - rule (3) of Rule 378 reads thus:-

(3) The application before the Collector for reference shall be treated as the plaint and the investigation shall be with reference to the claim made therein

Thus the application preferred by the claimant before the Collector u/s 18 of the Land Acquisition Act is to be treated as the plaint in the proceedings before the Reference Court. A written statement by the claimant is purely optional for the claimant unless the reference court requires the claimant to file a written statement. The relevant provision in this regard is sub-rule (4) of Rule 378. It reads as under:

(4) The claimants may, and if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement setting out their claim in full.

The Reference Court was thus clearly in error in finding fault with the claimants for not filing a statement without the court directing them to do so.

E. Whether dismissal of subsequent review petitions is a bar to these appeals?

10. It is true that after dismissal of the restoration petitions the appellants had

filed petitions to review those orders and those petitions were also dismissed. The orders on those review petitions have not been separately challenged by the appellants who have however admitted in the memoranda of appeal that their review petitions were also dismissed. Dismissal of a review petition is not appealable whereas an order allowing a review petition is appealable under Order XLIII Rule 1 (w) C.P.C. Since there is no right of appeal for the claimants against the dismissal of their review petitions, this Court is not precluded from exercising its power of revision under Sec. 115 C.P.C. or its supervisory power under Article 227 of the Constitution of India both of which are suo motu powers unlike the power of review. In these appeals this Court can examine the correctness of the orders dismissing the references for default and render justice to the aggrieved claimants. An "appeal" is an application by a party to an appellate court asking such court to set aside or revise a wrong decision passed by a subordinate court. (Vide AIR 1932 165 (Privy Council)). Hence, we are not inclined to uphold the hypertechnical contention raised on behalf of the requisitioning authority that without challenging the orders on the review petitions the appellants are precluded from questioning the legality of the orders dismissing the references for default.

F. Are the appellants debarred from prosecuting both the remedies available to?

11. Equally misconceived is the objection that once the appellants have exhausted their remedy of filing applications under Order IX Rule 9 C.P.C, they are debarred from invoking the other remedy open to them. Had it been an ex-parte decree passed in a suit before a regular civil court, the aggrieved defendant has two options open to him. They are:

i) an application under Order IX Rule 13 C.P.C.

ii) an appeal u/s 96 C.P.C.

(Vide Haridas v. Madhavi Amma-1987 (2) KLT 701)

In fact, there are two more options namely :-

iii) an application for review under Order XLVII C.P.C.; and

iv) a separate suit to set aside the decree on the ground of fraud etc (vide Ajith Mathews v. Sheelamma Thomas - 2011 (2) KHC 252. (DB)

The remedy provided under Order IX Rule 13 C.P.C. and the remedy by way of appeal are not mutually exclusive. There is no bar in resorting to both the above remedies either; simultaneously or any one of them alone. (Vide Haridas v. Madhavi Amma-1987 (2) KLT 701) As mentioned in paragraph 9 above, even in the case of a dismissal of a suit for default, if it is not appealable for the reason that it is not a decree, it will still be revisable under Sec. 115 C.P.C. In the present case, as already discussed above, an order dismissing a reference for default amounts to an award which is appealable under Sec 54 of the Land Acquisition Act But here the present appeals are not filed under Sec. 54 of the

Land Acquisition Act but under Order XLIII Rule 1 C.P.C. challenging the orders passed on the applications tiled under Order IX Rule 9 C.P.C. The appellants are actually prosecuting their remedy under Order EX Rule 9 C.P.C. By filing these appeals they are not invoking the alternative remedy of appeal against the award. Even if the present appeals were filed under Sec. 54 of the Land Acquisition Act, the same would have been perfectly maintainable in view of the judicial pronouncements already adverted to above. Hence, the appellants were fully justified in filing these appeals.

OUR CONCLUSION

The orders passed by the Reference Court dismissing L.A.R. 138/1991 and 121 /1993 for default are set aside. The applications filed by the appellants for restoring the LAR cases will stand allowed after condoning the delay in filing those applications. For the reasons already stated in paragraph 11 above, we also set aside the orders passed by the reference court dismissing the review petitions filed by the appellants. The aforesaid LARs will stand restored to file for fresh disposal on merits in accordance with law after giving both sides an opportunity of being heard. However, having regard to the passage of enormous time evidently on account of the culpable lethargy on the part of the appellants in not making frequent enquiries with their counsel about the fate of their references, we direct that in the event of any enhancement being granted to the appellants they shall not be entitled to interest on such enhanced compensation for the period of delay between the order for default and the filing of the restoration petitions. The parties shall appear before the court below without any further notice on 26-3-2012.

In the result, these appeals are allowed as above. No costs.

It is rather unfortunate that even after repeated petitions by the aggrieved appellants the court below was not alerted to the necessity of discovering its own wrong. Instead, the court below seemed to exhibit a blithe attitude devoid of the expected sensitivity and sensibility from a court of justice. The court below should not have revelled in mercilessly dismissing all the petitions filed by the appellants unmindful of the reality that the injustice was actually in the order of the Court and not in the petitions filed by the appellants. Some of the claimants bid farewell to this world without enjoying the fruits of their labour. The surviving claimants are now back to square one. More than 20 years ago, under an expropriatory legislation they were deprived of their precious little in the form of a few parcels of land. The guarantee of just compensation has been an elusive far cry for them. We believe and hope that their trials and tribulations are over. We, however, hasten to remind them of their primary duty -vigilantibus et non dormientibus jura subveniunt (the law helps only the vigilant and not those who sleep).

The registry shall re-transmit the lower court records to the court below forthwith.