

(2015) 07 KL CK 0113

In the High Court Of Kerala

Case No : Writ Petition (C) No. 5558 of 2014 (T)

Kuriakose K.A.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 28-07-2015

Acts Referred:

Kerala Municipalities Act, 1994 — Section 208A, 30
Kerala Panchayat Raj Act, 1994 — Section 218
Land Acquisition Act, 1894 — Section 17

Citation : (2015) 07 KL CK 0113

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : Alexander Joseph and T.P. Joseph, for the Appellant; S. Jamal, Government Pleader, Advocates for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J—The petitioner owns 10 cents of land in Survey No. 1015/1 of Kothamangalam Village. The said property is situated on the banks of Kuroor thodu and the petitioner in the above writ petition raises serious concerns on the decision of the respondent Municipality to divert Kuroor thodu.

2. The thodu is said to be a rivulet, which is not man made and a tributary of the Periyar River. The thodu cuts through the Municipal Town area and is said to have made the outward precincts of the Municipality, suitable for paddy cultivation. In passing, it is also stated that there are encroachments on the banks of the thodu; but no such encroacher has been made a party in the above writ petition.

3. The cause of action for the above writ petition is said to have its origin in a proposal of the Municipality to acquire certain property, for construction of a Town Hall. Ext P4 is the Government sanction for such acquisition and Ext. P5 indicates Section 17 of the Land Acquisition Act, 1894; the emergency clause, having been invoked for acquisition of the said property. Ext. P6 is the location sketch drawn up for the purpose of acquisition. Obviously, the acquisition

materialised but the plan to construct a Town Hall was allegedly shelved. The property remained as such and Kuroor thodu flowed through the boundary of the said property. The Survey sketch showing the thodu and the proposed diversion is produced at Ext. P10. The location sketch shows that the thodu runs through the northern and eastern boundary of the property comprised in Survey No. 1015/1. The proposed diversion is adjacent to the southern boundary of Survey No. 1015/1. The serpentine course of the thodu is sought to be straightened and a portion attempted to be diverted through the center of the acquired property, which acquisition was for the purpose of constructing a Town Hall. The new proposal to divert the water course is evident at Ext. P8, which is a communication from the Chairman of the Municipality to the Chief Engineer, Irrigation, Thiruvananthapuram.

4. The petitioner's contention is that, the thodu had 40 metres width, which is now sought to be reduced to 24 metres and this would, in fact, cause flooding of the property in Survey No. 1015/1. The challenge, according to the learned counsel appearing for the petitioner, is raised on multifarious grounds, as indicated below:

(i) The land acquired through which the diversion of the thodu is now proposed was acquired for a specific purpose and the same cannot be utilised for another purpose.

(ii) There can be no filling up of the existing thodu since, though the thodu vests in the Local Self Government Institution, the power conferred under Section 30 of the Kerala Municipality Act, 1994, read with Schedule I entry 5 is only for maintenance of the thodu, and not for filling it up. The learned counsel would also rely on *Kuriyakose Thomas Vs. Ombudsman For Local Self Government Institution and Others*, (2014) 1 ILR (Ker) 366 : (2013) 4 KHC 455 : (2013) 4 KLJ 440 to buttress the above contention.

(iii) Even according to the 4th respondent, the Officer of the Irrigation Department, there is to be no filling up of the thodu, but the diversion now proposed definitely would require filling up of certain portion of the thodu.

(iv) The Municipality has attempted to exchange a portion of the property, acquired by the Municipality to the property owner who has land in Survey No. 1015/3 and that coupled with the diversion proposed, would render a portion of the acquired property land-locked.

(v) There are trespassers on the thodu which trespass has to be removed and the thodu restored to its original state. That alone would suffice to mitigate the issue of flooding and roads being inundated during monsoon, which presumably is sought to be addressed by the diversion. Hence, no purpose would be served.

(vi) The drainage of the Municipality opens into the thodu at the portion which is now sought to be filled up, and the diversion would only flood the town area more during monsoon.

(vii) Maintenance of the thodu is the present need and not a diversion as proposed by the Municipality.

5. The Municipality, the Water Resource Department and the Executive Engineer, Department of Minor Irrigation at Ernakulam have filed separate versions, so has the 11th respondent, who is the Contractor entrusted with the work. The Municipality asserts that the construction of the Town Hall has not been shelved and the same is planned to be taken up. In addition to that, the zig-zag course of the thodu is also attempted to be straightened to reduce flooding of the Town during the monsoon and for the purpose of maintaining the thodu properly, constructing retaining walls on both the banks. The work was sanctioned by the Government and the same is executed through the Irrigation Department with the funds of NABARD. The Municipality stoutly denies the plea of the petitioner that what is intended is "protection of encroachers and an unnecessary exercise to loot public money". The Irrigation Department, by their separate statement, has also supported the claim of the respondent Municipality. The contractor is concerned with the execution of the work which has been stayed by this Court by an interim order.

6. At the outset it is to be noted that the question of encroachment is agitated without any of the encroachers in the party array and most of the contentions raised are in the nature of a Public Interest Litigation, which cannot be addressed by the petitioner before this Court, especially since the petitioner has filed the above writ petition projecting the grievances as one causing personal prejudice.

7. As for the first contention of the land being used for another purpose, it is always within the authority of the State and its instrumentality, to put to use the land acquired for the specific purpose or for any other purpose which advances public need. Further, the petitioner does not have a case that the petitioner's property was acquired and there could be no personal prejudice pleaded; on the Municipality deciding to use the said property for any other public purpose. However, this Court need not delve upon it since the Municipality asserts that they are also proceeding with the construction of the Town Hall. The diversion of the thodu is said to be only to facilitate such construction and to avoid flooding of the town area.

8. The second contention with respect to the filling up of the "thodu" is raised on the strength of the provisions of the Kerala Municipality Act, 1994 (for brevity the "Act") as also the decision in Kuriyakose Thomas (*supra*) and also on the basis of the counter affidavit filed by the Irrigation Department, which, according to the petitioner speaks of no filling up being attempted. By Section 30 of the Act, the Municipality has exclusive administrative prerogative in respect of the matters enumerated in the First Schedule and it has the power coupled with the responsibility to prepare and implement schemes for development and social justice in relation to such matters. The First Schedule, as pointed out by the learned counsel for the petitioner, provides for the maintenance of water ways and canals under the control of the Municipality, and makes it a mandatory

function of the Municipality. The Minor Irrigation too under item "C-III" is a function of the Municipality as also preparation of detailed town planning and action plan for implementation in a phased manner under Item No. 30. By Section 208A of the Act all water courses including springs, reservoirs etc vests absolutely with the Municipality and all rights and liabilities of the Government with respect to such water courses would also be vested with the municipality.

9. The decision in Kuriyakose Thomas (supra) dealt with Sections 218 of the Panchayat Raj Act, 1994, wherein the Panchayath is statutorily bound to ensure the preservation of ponds. The decision is only to the effect that merely on such vesting having been made statutorily, the Panchayath does not get the authority to fill up such a pond. The statutory mandate was found to be one intended at ensuring preservation of ponds and not filling it up.

10. In the present case also there is no instance of totally filling up the water course. The specific work undertaken is of diverting the water source, which according to the Municipality, is for the purpose of avoiding the recurrent problem of inundated roads during rains and resultant damage caused due to such flooding. The Panchayath specifically intends to build a retaining wall thus preserving the water course and streamlining it, avoiding its zig-zag course, which would only facilitate free flow of water and also in the process, ensure that no flooding is caused during the rainy season. It is to be noticed that the Local Self Government Institution, headed by the Council of the peoples' representatives, elected by the people, in their wisdom has decided to divert the water course to advance the public cause.

11. The wisdom of such course adopted by the Council of the Municipality cannot be easily interfered with by Courts. No Court would substitute its wisdom for that of the Council merely on the strength of its opinion being more reasonable; when an authority, cast with such responsibility that too under a statute; finds otherwise. The confines of judicial review restrains this Court from interfering with a reasonable proposal of the Local Self Government Institution; which interference would be caused only if there is any patent illegality or otherwise an obvious irregularity in the decision making process. This Court is unable to find any such grounds in the aforesaid case.

12. The statement filed by the 4th respondent also does not commend an interference on the ground of an alleged admission made in the statement. The statement filed by the 4th respondent indicates that the submission in the writ petition that the average width of the "thodu" is 43 metres is not correct. The "thodu" is said to have 13 metres width at the source and at some places extending between 25-30 metres. The proposal of the Municipality is said to be one to widen it at a uniform level of 20 metres. It is specifically averred that the said work would not shorten the "thodu" nor would it affect the flow of water. The proposal for such work recommended by the Kothamangalam Municipal Council was said to be placed before the Irrigation Department. The Irrigation Department on inspection found the "thodu" to have two bends in the proposed

diversion area and the same having width as low as 13 metres. The department specifically contends that the proposal, when implemented, would reduce the flooding upstream, during rainy season. The statement that existing "thodu" is not being filled, only indicates that there is no total filling up of the "thodu". The proposal is for the construction of retention walls and converting the "thodu" to be of uniform width, with the serpentine course being straightened. This would definitely lead to some filling up, but that would only ensure the free flow of water, is the specific stand of the Irrigation Department.

13. The single statement made cannot be read out of context and the entire averments has to be read as a whole. The diversion is also said to be only to be of an extent of 200 metres length at the curved portion. The width proposed is also 20 metres at the bottom and 25 metres at the top. The need for straightening is also projected on the ground of the water flow being hampered in the curved portion by reason of collection of debris deposited by the public in the "thodu". It is to avoid such choking up of the "thodu" that the proposed work is to be carried out.

14. The proposal for the subject work is said to have been submitted in September, 2011. The National Bank for Agriculture and Rural Development (NABARD) has also, after scrutiny, approved the project for implementation. The project has been taken up for implementation under the Rural Infrastructural Development Fund XIV Kerala. The assistance, as per the specific fund constituted, would lapse if the work is not completed within the specified time. The existing check dam is said to be insufficient to regulate water for reason of it having gone into disrepair and a new check dam is also proposed. The Executive Engineer of the Minor Irrigation Department has also supported the proposal of the Municipality. As has been stated, the above report would vindicate, the reasonable proposal made by the public authority enjoined with the duty of maintenance and preservation of areas within its jurisdiction. No citizen could raise any grievance on the ground that his opinion has to be treated as more conducive to the public need than that expressed by the authority, which is statutorily conferred with such powers.

15. The rather loose contention made with respect to the flooding of the property of the petitioner, cannot be countenanced looking at Ext. P10 location sketch. Admittedly, the "thodu" runs north of the petitioner's property situated in Survey No. 1015/1. The diversion to be effected by the Municipality, is lower on the northern boundary of Survey No. 1015/1. The "thodu" flows through the north of the properties comprised in Survey No. 1015/1 and turns south through the eastern boundary and flows further south where the diversion is sought to be effected, just adjacent to the southern boundary of Survey No. 1015/1. No allegation of flooding could be raised in the petitioner's property, which is nowhere near the proposed diversion.

16. The exchange of land made is only to facilitate the proper width of the "thodu". At the place where the property of a private individual in Survey No.

1015/3 has been taken over by the Municipality, a similar extent is conceded to the property owner, from the acquired land. There can be no defect found in such exchange being made. The property being land-locked cannot be presumed by merely looking at the sketch. The obstruction caused to the drainage of the Municipality definitely would be taken into account by the Municipality and the diversion would not be one which would put into jeopardy the drainage system, especially since the specific task undertaken is to prevent flooding of the town area.

17. The present need, as projected by the petitioner, for maintenance is one undertaken by the Municipality and it cannot be subject to the whims and fancies or of the opinion of each and every citizen, residing within the Municipality. This Court finds absolutely no merit in the writ petition, which seeks interdiction of the diversion of the "thodu" undertaken by the Municipality, with sanction from the Government and financed by the NABARD.

Writ Petition is found to be devoid of merit and the same is dismissed. The parties are left to suffer their respective costs.