

(2015) 07 KL CK 0152

In the High Court Of Kerala

Case No : Writ Petition (C) No. 29755 of 2004 (P)

Leela Antony and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 24-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 07 KL CK 0152

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : S.V. Balakrishna Iyer, Senior Advocate and K.G. Pavithran, for the Appellant; Manoj P. Kunjachan, Government Pleader, Advocates for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J—The petitioners in the above writ petition challenge the attempted action of the 2nd respondent, to take over certain properties of the petitioners, for the widening of the road. The petitioners together had 4 cents of land, comprised in Survey No. 1012/6A/1 of Kothamangalam Village and certain shop rooms thereon. The title of the petitioners is asserted by two sale deeds.

2. The essential contention of the petitioners before this Court was that the attempt of the 2nd respondent is to grab their lands for the widening of National Highway 49 [for brevity "NH 49"] on the ground that it is poramboke land; when the 2nd respondent could as well take acquisition proceedings and pay compensation to the land owners. When initially the attempt was made, the petitioners were before this Court with O.P. No. 1780 of 2003, which was disposed of by Exhibit P1 judgment. Exhibit P1 directed a proper application to be made before the 3rd respondent to demarcate the land and the same was directed to be done by the said respondent within one month. The 3rd respondent therein, the Survey Superintendent, is the 3rd respondent here also.

3. Alleging non-compliance of the order contained in Exhibit P1, a contempt case had been filed, as Cont. Case (C) No. 1294 of 2004. Alleged contemnor having retired from service, the then incumbent was made a party. Even the present incumbent submitted before Court that the 1st respondent, the alleged contemnor had in fact conducted a survey on 19.07.2004 prior to his retirement on 30.09.2004. The petitioners contended that certain documents were not available in the office of the contemnor and, therefore, submitted that the survey conducted cannot be accepted. The 2nd respondent in the contempt case contended before Court that the 1st respondent had merely sought for clarification and it was not as if the records were not available in the office of the Survey Superintendent. The Court noticed that the petitioners are disputing the correctness of the measurement. However, the Court felt that the same has to be adjudicated in a fresh proceeding and closed the contempt case without prejudice to the contentions of both the parties.

4. The aforesaid writ petition was filed challenging the survey said to have been conducted; but, however, without producing the sketch prepared at the survey. The petitioners in the above writ petition contended that actually no survey was conducted and they did not receive any survey sketch. The above writ petition was filed on 08.10.2004 and a status quo order was passed on 11.10.2004. The 2nd respondent very alertly filed a counter affidavit on 28.10.2014, producing the survey sketch and plan prepared on the survey conducted in accordance with Exhibit P1 judgment, as Exhibits R2(A) & R2(B).

5. The sketch and plan were seriously disputed by the learned Senior Counsel appearing for the petitioners on the ground that the measurements are not correct and seeks to substantiate such contention on the basis of the documents received by the petitioners from the office of the Survey Superintendent and the Central Survey Officer, produced as Exhibits P17 and P18. In the course of hearing, however, Exhibit P6 was referred to, in which it was disclosed that a notice was issued by the District Survey Superintendent in pursuance of directions in another writ petition, bearing number W.P.(C). No. 32258 of 2004. In such circumstance, this Court called for the Judges Papers of W.P.(C). No. 32258 of 2004.

6. W.P.(C). No. 32258 of 2004 is seen to have been filed on 02.11.2004, within a month from the date on which the present writ petition was filed. Therein, Exhibits R2(A) and R2(B) produced in this writ petition were produced as Exhibits P12(a) and P12(b) and the same were challenged on the ground of defect in measurements. A learned Single Judge of this Court dismissed the writ petition with the following observations:

"The dispute raised in this Writ Petition is a boundary dispute, which can be effectively adjudicated in a civil suit and not in a writ petition. Accordingly, the Writ Petition is dismissed without prejudice to the contentions of the petitioners and their right to move the competent civil court. Since the contention of the petitioners is that the survey records have been manipulated and illegal survey

reports - Exts. P12(a) and P12(b) have been prepared, those actions are ultra vires and therefore, the competent civil court can entertain the suit, even if there is any bar under the Land Conservancy Act. Protection is available only to intra vires actions (see the decisions of the Apex Court in Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, AIR 1969 SC 78 : (1968) 3 SCR 662 : (1968) 22 STC 416 and Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, (2002) 83 ECC 85 : (1997) 68 ECR 273 : (1997) 89 ELT 247 : (1996) 11 JT 283 : (1996) 9 SCALE 457 : (1997) 5 SCC 536 : (1996) 10 SCR 585 Supp : (1998) 111 STC 467 ".

7. The challenge raised in the present writ petition, filed before W.P.(C). No. 32258 of 2004, hence, no longer survives. It is also a matter of concern that the present writ filed in the year 2004 was pending in this Court till today with a status quo order, while the said contentions were addressed in another writ petition [W.P.(C). No. 32258 of 2004] filed by the very same parties subsequent to the present one and the extra-ordinary remedy under Article 226 of the Constitution declined. The respondent authorities also seems to have been unaware of the two writ petitions filed, especially since the NH Sub Division, Kothamangalam was never issued with notice in W.P.(C). No. 32258 of 2004 and that writ petition was dismissed at the admission stage itself. The petitioners, however, cannot feign ignorance of having initiated two proceedings.

8. The pendency of the first writ petition is not seen referred to in the second writ petition. This Court, hence, finds that there is clear abuse of process of law and there is suppression of material facts. The petitioners were relegated to the civil Court remedy in 2004 itself. If the petitioners have taken up the said remedy, then definitely that could be continued; but, however, if they have not, their conduct as also the long passage of time disentitles the petitioners from raking up the issue now. This Court already declined exercise of jurisdiction under Article 226 and relegated the petitioners to the civil remedy, this Court does not find any reason compelling to invoke exercise of such jurisdiction in a writ petition filed earlier to that dismissed. In taking such view, this Court is considerably persuaded by the fact that the petitioners have employed subterfuge in filing the two writ petitions on the same grounds within a period of one month, which has to be deprecated. In such circumstances, the petitioners shall be mulcted with a cost of Rs. 2,500/- [Rupees two thousand and five hundred] each, which shall be recovered by the 2nd respondent.

The writ petition would stand dismissed with costs to the respondents, in addition to the cost imposed as above.