
(1990) 04 KL CK 0001
In the High Court Of Kerala
Case No : O. P. No. 2720 and 2842 of 1990

Pally Daniel

APPELLANT

Vs

Special Tahasildar (L A) and Others

RESPONDENT

Date of Decision : 06-04-1990

Acts Referred:

Kerala Land Acquisition Act, 1961 — Section 20, 33(2)
Land Acquisition Act, 1894 — Section 12(2), 18, 31(2)

Citation : (1990) 2 KLJ 27

Hon'ble Judges : P. Krishnamoorthy, J

Bench : Single Bench

Advocate : T. C. Thomas, for the Appellant;

Final Decision : Dismissed

Judgement

P. Krishnamoorthy, J.—In these two Original Petitions a common question arises and so the are being disposed of by a common judgment. The prayer in these Original Petitions is to direct the respondent-Land Acquisition Officer to refer the matter to the court for fixing the compensation under Sec. 20 of the Kerala Land Acquisition Act. In O. P . No. 2720/90 an award was passed and the Petitioners received the cheque for the amount on 26-8-78. It was encashed on 29-8-78. They filed an application evidenced by Ext. P3 on the same day in which they made a protest regarding the compensation amount and requested the Land Acquisition Officer to refer the matter to court. No order on the petition has so far been communicated to them and hence the Original Petition is filed for a direction to the Land Acquisition Officer for referring the matter to the Court.

2. In In pursuance to the award the petitioner received the cheque for the amount due under the award on 6-5-78. Application for reference under Sec. 20 of the Kerala Act was sent of 9-5-78. In that application he has stated that he received the amount under protest and that he is not satisfied with the award end the matter may be referred to the court. The application was sent by registered post dt. 9-5-1978 and it was received in the office on 10-5-78. In this

case also no order has so far been communicated to the petitioner and the prayer is for a direction to refer the matter to court under the Land Acquisition Act.

3. Learned Government pleader took notice and pitted the files before me. It is her contention that in the application for issuing of a cheque for the amount due under the award there was no protest.

Nor did the petitioners make any protest when they received the cheque for the amount due. In these circumstances the case of the Government Pleader is that the amount was received without protest and that the subsequent protest Made in the application or reference will not serve the purpose. She relied on the second proviso to Sec. 33 (2) of the Act to contend for the position that the petitioners shall not be entitled to make any application under Sec. 20.

4. The question for consideration is whether the petitioners are precluded from making an application under sec. 20 on the ground that they have received the amount due under the award otherwise than under protest. The second proviso to Sec. 33 (2). reads as follows:-

Provided further that no person who has received the amount otherwise than under protest shall be entitled to make any application u/s 20;

Counsel for the petitioners contended that the mere acceptance of a cheque will not amount to payment and that it is enough if they make a protest before actual payment is made. According to them it is enough if they make a protest before encashing the cheque and it is not necessary that when the cheque was received it should be received under protest. It is their case that the mere tendering of a cheque will not amount to payment so as to disentitle them under the second proviso to Sec. 33(2) from making an application under Sec. 20. In support of this contention they relied on two decisions of the Calcutta High Court, namely Brojendra Coomar v. Sirish Chandra, (AIR 1954 Calcutta 459) and Shree Nursing Timber Works and Another Vs. Sm. Amala Bala Dassi, . In both the cases the question was as to whether the arrears of rent paid by means of cheque is a valid tender of payment. In this context in AIR 1969 Calcutta 12 it was observed as follows:-

It is well known that a cheque is never a valid tender unless it is accepted by the payee as a valid tender of payment.

From the above decision it is clear that the giving of a cheque is a valid payment if it is accepted as payment by the creditor.

5. The effect of payment of money due by means of a cheque was elaborately considered by the Bombay High Court in Kirloskar Bros. Ltd. Vs. Commissioner of Income Tax, Bombay, . It was observed in that decision that a cheque is looked upon as a payment if a creditor accepted a cheque in place of the country's currency. It was also held therein that it was immaterial when a cheque was cashed; what is material is when the cheque was given, and the payment is

made when the cheque was given and not when the cheque was cashed. Chagla C.J. has explained the position in the following manner:

When a cheque is accepted by a creditor as a conditional payment, the preference by the creditor of accepting a cheque rather than cash operates as a payment to the creditor when the cheque is given, although the liability of the debtor may revive in the event of the cheque not being ultimately cashed.

This decision by Chagla C. J was followed by Division Bench of the Madras High Court in Mohideen Bi v. Khatoon Bi (AIR 1966 Mad. 435) and therein it was held that a cheque is looked upon as a payment if a creditor accepts a cheque in place of the country's currency. In a similar situation arising under the Land Acquisition Act, the Delhi High Court in Fateh Singh Vs. Land Acquisition Collector and Others, has also held that payment by cheque will constitute payment under the Act and the acceptance of a cheque amounts to an acceptance of payment, and if no protest is made at the time of such acceptance no application will lie under Sec. 18 of the Central Act (corresponding to Sec. 20 of the Kerala Act). In view of the above decision it is clear that if a person to whom money is due accepts a cheque in satisfaction of the amount due to him, that will be treated as valid payment. The passage quoted by me from the Calcutta decision also supports this view. Learned Government pleader placed before me the files relating to the case and from the files it is seen that the petitioners in both the O. Ps. had actually filed an application for issuing a cheque to them for the amount due under the award. Petitioners themselves wanted the amount to be paid by means of a cheque which will conclusively show that it was at their request that the payment was made by way of cheque and that it will amount to payment of the amount due under the award. Even in the application for issuing of a cheque there was no statement by the petitioners that the cheque may be issued to them under protest. In these circumstances, I have no hesitation to hold that the petitioners received the amount due under the award without their making any protest.

6. Counsel for the petitioners laid great stress on a decision of the Mysore High Court reported in Krishna Rao v. L. A. Officer & R. D Officer (AIR 1960 Mysore 264) wherein it was held that the mere receipt of a cheque by the petitioner without protest did not amount to receipt of compensation which was still lying with the Government. It was further held that in such circumstances there was no receipt of payment otherwise than under protest and the bar under the second proviso to Sec. 31(2) of the Central Act did not apply. But on going through the facts of the case it is seen that on 10-7-56 an award was passed by the Land Acquisition Officer and on 31-7-56 notice of the passing of the award was served on, the petitioner under Sec. 12(2) of the Land Acquisition Act. Thereafter on 2-8-56 a C-Form cheque was actually sent, to the petitioner but the petitioner did not receive payment from the Treasury Office. On 16-8-56 petitioner made an application asking the Land Acquisition Officer to refer the case under Sec. 18 of the Land Acquisition Act to the Sub Court, Mangalore.

From the above facts it can be seen that it was not on the application of the claimant therein that the cheque was issued but as a matter of fact it was sent to the claimant by the Land Acquisition Officer. It was in that factual situation that the Mysore High Court came to the conclusion that the receiving of such a cheque will not disentitle the petitioner from making an application for reference under Sec. 18. But, as stated earlier, in the case before me both the petitioners received the cheque in lieu of payment on their application and it was not a voluntary act on the part of the Land Acquisition Officer, as was done in the Mysore case. In view of the above position, I am of the opinion that the above decision can have no application to the facts of the present case.

7. Counsel for the petitioners relied on the decision in *Patel Vashram v. State* (AIR 1989 Gujarat 231) and contended for the position that it is not for the Land Acquisition officer to decide whether the amount was received under protest or not but it is only for the reference court to go into the question as to whether it was received under protest. With great respect I am unable to agree with the dictum laid down in that decision. The second proviso to Sec. 33(2) of the Kerala Act categorically provides that no person who has received the amount otherwise than under protest shall be entitled to make any application under sec. 20. The proviso prohibits the making of an application if he receives the amount without making any protest. A decision has to be taken by the Land Acquisition Officer on an application under sec. 20 and certainly it is within his jurisdiction to decide as to whether the second proviso to Sec. 33(2) is a bar to the application made under sec. 20.

8. In both the cases the petitioners received the cheque for the amount due under the award on their own application. No protest was noted in that application. Nor was any protest made when they received the cheque. In these circumstances, their makings protest in the application for reference made on a later date cannot save them from the embargo put by the second proviso to Sec. 33 (2) of the Kerala Land Acquisition Act and the petitioners are not entitled to have their matter referred to the land acquisition court.

9. It was also contended that as a matter of fact they had made an oral protest before the Land Acquisition Officer at the time when they received the cheque which was denied by the learned Government Pleader. The application for reference was filed in 1978 and after a period of 12 years it will not be proper for this Court to decide as to whether an oral protest was made or not. The contemporaneous document, namely the application for cheque, does not disclose any protest and in the circumstances the case of the petitioners that they made an oral protest cannot be accepted. In the result, I do not find any merit in the Original Petitions and they are accordingly dismissed, but, in the circumstances, without any order as to costs.