
(2014) 08 KL CK 0224

In the High Court Of Kerala

Case No : W.P.(C) Nos. 9232, 11038 and 11039 of 2013

Philip John

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Kerala Survey and Boundaries Act, 1961 — Section 4, 5, 6, 6(1)

Citation : (2015) 1 KLT 745

Hon'ble Judges : A.V. Ramakrishna Pillai, J

Bench : Single Bench

Advocate : P.K. Suresh Kumar, Sr. Advocate and K.P. Sudheer, Advocates for the Appellant; Abhijith Lesli, Sr. Government Pleader, V. Santharam, Thomas Antony and Asish K. John, Advocates for the Respondent

Judgement

A.V. Ramakrishna Pillai, J.—The proposal for acquisition of properties for a new road at the instance of Inland Waterways Authority of India (the 4th respondent), is under challenge in these Writ Petitions. The petitioners own different properties in different survey numbers of Maradu Village. The petitioners allege that the 4th respondent is having the Inland Water Transport Terminal in NW-3 at Kannadikadu, which has an approach road having a width of 12 meters from the main gate connecting it to the NH-47 bypass road through the existing NH-47 service road. They would allege that during 1990, the land acquired for widening the existing approach road and the compensation for acquisition was paid off and the land was taken possession of almost two decades ago though the same was not utilized till now for widening the existing approach road. Their grievance is that now the 3rd respondent on 13.03.2013, issued a notification under S. 6 of the Kerala Survey and Boundaries Act (for short "the Act") proposing survey of land for the formation of another 12 meter wide approach road from the very same terminal to connect it to the same NH-47 bypass road for providing mobility for heavy vehicles. The petitioners allege that the newly proposed road is through private property requiring an extent of 3836.53sq.mtrs. of land to be acquired from private persons. The

petitioners would point out that if the existing approach road is widened to the required width and bell mouths are provided at junctions, the land requirement would be less than 1/10th of the land required under the newly proposed acquisition and the same would save public money. The notification under Section 6 is challenged by the petitioners on the ground that it was not preceded by a notice under Section 4 of the Act. Therefore, according to the petitioners, the acquisition proposed has to be stopped at the threshold to protect public money. It is with this background, the petitioners have come up before this Court.

2. In the counter affidavit filed by the State, they would contend that the 2nd respondent was directed to issue S. 6(1) notification under the Kerala Survey and Boundaries Act. After conducting a joint site inspection, the same was published in two dailies on 14.03.2013 and 15.03.2013 and also in the Kerala Gazette dated 16.04.2013 for acquisition of 38.37 ares of land in Sy Nos. 2, 3, 4, 7, 8, 9, 10, 11 and 12 of Maradu Village. The properties were identified and boundary stones were planted. According to them, the notification was strictly in accordance with law. It was further contended that the 2nd respondent is the competent officer to issue notification under S. 6(1).

3. The 4th respondent filed a detailed counter affidavit. They would contend that the width of the road proposed for acquisition for development of approach road, is only 10 meters. According to them, it was considered keeping in view the turning radius at Nair's Hospital Jn. as well as the non-turning point, where the land width is more than 10 meters, for a smooth and safe mobility of container transport. According to them, on receipt of the final intimation, the 3rd respondent initiated action for acquisition of land. They would contend that under S. 4, what is mandatorily contemplated is to order survey of land or of boundary of any land or of the boundary forming the common limit of any government land and any registered land. The notification contemplated under Section 4 has to be published as per Section 6 of the Act. According to them, it is not mandatory that notification should be published under Section 4. Therefore, the 4th respondent prayed for a dismissal of the Writ Petition.

4. I have heard the learned senior counsel appearing for the petitioners, the learned senior Government Pleader and the learned Standing Counsel for the 4th respondent.

5. Admittedly, Ext. P1 notification was issued under S. 6 of the Act. The learned senior counsel appearing for the petitioner made a frontal attack against S. 6 notification on the ground that it was not preceded by a prior gazette notification required under S. 4 of the Act. The learned Standing Counsel for the 4th respondent per contra would submit that the notification under S. 4 is not mandatory.

6. Admittedly, only the survey and planting of stones have been taken place and proceedings for acquisition are yet to be started. The pertinent question to be answered is whether Ext. P1 notification is valid in the eye of law. The contention

of the petitioners is that a notification under S. 6 of the Act has to be preceded by a notification under S. 4 of the said Act. Before going into the merits of the contention, it is useful to have a look at Ss. 4 and 6 of the Act, which are as under;

"Section 4. Government may direct the survey of any land or any boundary of any land.--The Government or, subject to the control of the Government, any officer or authority authorised by the Government in this behalf, may by notification in the Gazette, order the survey of any land or of any boundary of any land or of the boundary forming the common limit of any Government land and any registered land.

"Section 6. Notification to be published by Survey Officers.--(1) When any survey is ordered under section 4 or section 5, the Survey Officer shall publish a notification in the Gazette in the prescribed manner inviting all persons having any interest in the land or in the boundaries of which the survey has been ordered, to attend either in person or by agent at a specified place and time and from time to time thereafter when called upon for the purpose of pointing out boundaries and supplying information in connection therewith:

Provided that where the survey is ordered for the purpose of, or in connection with, the acquisition of any land under the law relating to compulsory acquisition of land for public purposes for the time being in force, the notification under this sub-section may be published in the Gazette or in two daily newspapers which, in the opinion of the Survey Officer, have wide circulation in the locality in which the land in respect of which the survey has been ordered is situated.

(2) A notification published under sub-section (1) shall be held to be a valid notice to any person having any interest in the land or in the boundaries of which the survey has been ordered.

(3) Such notification shall further require every person, whether a registered holder or not, having interest in the land or in the boundaries of which the survey has been ordered.

a. to clear within a specified period by cutting down or removing any trees, jungle, fences, standing crops or other material obstructions, the boundaries or other lines the clearance of which may be necessary for the purpose of the survey;

b. to provide labour at such times and for such periods as may, from time to time, be required by furnishing flag holders and chainmen; and

c. to provide suitable survey marks and otherwise to give such assistance in the survey as may be demanded under this Act or the rules made thereunder.

(4) If any person fails to comply with any requisition of a Survey Officer made under clause (a), clause (b) or clause (c) of sub-section (3), the Survey Officer may himself employ hired labour or such number of chainmen as he considers

necessary for the purposes of survey.

(5) The cost of the labour and the cost for the time and labour of the chainmen whether such chainman be Government servants or not employed and of the survey marks used in such cases shall be determined and apportioned in the prescribed manner among the persons who have any interest in the land or in the boundaries of which the survey has been ordered, and shall be recoverable from such persons as an arrear of land revenue. Notice of such determination and apportionment shall be given in the prescribed manner to the persons aforesaid."

A combined reading of S. 4 with S. 6 of the Act makes it clear that the notification referred to under Section 4 has to be published under S. 6 of the Act which is the enabling provision. What is mandatorily contemplated under S. 4 is to order survey of land or of boundary of any land or of the boundary forming the common limit of any government land and any registered land. What is stated in S. 4 is "may by notification in the gazette", which means, even if a notification is contemplated, the same is not mandatory as the word used is "may" in the particular section. Whereas under S. 6, a notification in the gazette is mandatory, giving all the details stated under S. 6, which is now published as per Ext. P1. Even if a notification is not published under S. 4, the same will not in any way prejudice the persons interested since S. 4 contemplates only ordering the survey of land etc., by the Government. Here, in Ext. P1, all the details that are required under S. 4 and S. 6 have been stated under Ext. P1 notification.

7. The use of the word "shall" with respect to one matter and use of word "may" with respect to another matter in the same section of a statute will normally lead to the conclusion that the word "shall" imposes an obligation, whereas the word "may" confers a discretionary power. But, that by itself is not decisive and the court may, having regard to the context and consequences, come to the conclusion that the part of the statute using "shall" is also directory. It is primarily the context in which the words are used which will be of significance and relevance for deciding this issue. [See Principles of Statutory Interpretation by Justice G.P. Singh, 11th Edn., 2008].

8. Maxwell on The Interpretation of Statutes (12th Edn.) observes that the statutes, which encroach upon rights, whether as regards person or property, are subject to strict construction in the same way as penal acts. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights and if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted. It may not be possible to lay down any straitjacket formula which could unanimously be applied to all cases. It will always depend upon package like facts of the case, legislation in question, objects of the legislation etc. If the interpretation defeats the very purpose of the Act and the legislative intendment and the objects sought to be achieved, such interpretation may not be acceptable in law and in public interest The word "shall", therefore, ought to be construed not according to the language with

which it is clothed, but, in the context in which it is used and the purpose it seeks to serve. (See *State of Haryana and Another Vs. Raghubir Dayal*, . The Apex Court in *May George Vs. Special Tahsildar and Others*, observed as under;

"The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance with the provision could render the entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of the legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject-matter and object of the statutory provisions in question. The Court may find out as to what would be the consequence which would flow from construing it in one way or the other and as to whether the statute provides for a contingency of the noncompliance with the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid."

9. As I have already pointed out, as S. 4 contemplates only ordering me survey of land; and as in Ext. P1 in the present case, all details which are required under Ss. 4 and 6 have been stated, this Court is of the view that the petitioners cannot have any grievance at all. Ext. P1 is only a pre-survey of lands before the land is acquired. Elaborate procedure has to be scrupulously followed under various Sections of the Land Acquisition Act before the proposal for acquisition is enforced. As the new Act has come into force, the acquisition can be only in accordance with the provisions of the new Act. It was pointed out by the learned Standing Counsel for the 4th respondent that subsequent to the publication of the notification, the 3rd respondent has requested the 4th respondent to provide boundary pillars on the proposed new alignment as per Ext. R4(c). It was further pointed out that the new proposal of approach road with 10 meters width will have proper road connectivity with the Water Transport Terminal and NH-47, which is fuel efficient, safe and highly environment friendly mode of transport. It was further pointed out that once the water transport mobility is established at Maradu Terminal, the highly dangerous heavy containers can be transported to various places within the State of Kerala duly avoiding the congested National Highways/State Highways. Therefore, viewed in the angle of larger public interest also, there is little scope for interference in this matter.

Therefore, the Writ Petitions are dismissed making it clear that the acquisition of the land of the petitioners shall be in accordance with the new legislation for the acquisition of lands for public purpose.