

(2013) 01 KL CK 0018
In the High Court Of Kerala
Case No : Writ Petition (C) No. 124 of 2008

Yousuf M.A.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 29-01-2013

Acts Referred:

Kerala Government Land Assignment Rules, 1964 — Rule 8(3)

Citation : (2013) 2 KHC 85

Hon'ble Judges : C.K. Abdul Rahim, J

Bench : Single Bench

Advocate : K. Shrihari Rao and N. Shobha, for the Appellant; Muhammed Shafi M., Senior Government Pleader and P.K. Muhammed, for the Respondent

Judgement

C.K. Abdul Rahim, J.—The issue involved in this writ petition has got a chequered history. One Sri. Abbas, father of the petitioner and maternal grandfather of respondent No. 5, was assigned with land having an extent of 0.53 Acres comprised in Resurvey No. 139/3 of Thekkil Village in Kasaragod Taluk. The order of assignment was issued on 18/02/1967 by the 4th respondent Tahsildar. After the lapse of about 34 years, the 5th respondent filed an appeal challenging the assignment, before the 3rd respondent. The appeal was filed when an application for assignment of the same land, submitted by the 5th respondent during the year 2001, was rejected for the reason that land in question stands already assigned in favour of Sri. Abbas. Contentions raised in the appeal was that, Sri. Abbas had executed a Gift Deed in the year 1964 in favour of the 5th respondent and his siblings, transferring property having an extent of 0.75 Acres comprised in RS No. 139/2 and 0.53 Acres in RS No. 139/4. According to the 5th respondent the property of 0.53 Acres in RS No. 139/3, which was assigned in favour of Sri. Abbas, is situated in the middle of the properties gifted and the said property was in the possession of the donees even at the time when the assignment was made in favour of Sri. Abbas. It seems that the assignment was challenged on the ground that the assignee was not having possession over the land at the relevant time. Originally, the appeal was dismissed through Ext P1

finding that the 5th respondent was having only the age of 7 years at the time when the assignment was made, and therefore he cannot be said to be in beneficial enjoyment of the land at that time. It was also found that the 5th respondent has got 1.28 Acres of land in his ownership and therefore no assignment can be made in favour of him. Ext. P1 order was taken up in revision before the 2nd respondent. The revisional authority had remanded the matter through Ext. P2 order, observing that the Appellate Authority had not decided the issue on the basis of relevant factual and legal positions. The 3rd respondent was directed to dispose of the appeal afresh, after hearing both sides and after examining the case with reference to relevant provisions in the Kerala Land Assignment Rules, 1964, especially to Rule 8(3) (mistakenly mentioned as Rule 8(2) in Ext. P2 order). The matter was considered afresh and disposed of by the 3rd respondent through Ext. P3 order. The 3rd respondent found that the assignment was after execution of the Gift Deed with respect to properties comprised in RS No. 139/2 and 139/4. Hence it was found that the assignment was ordered without property verifying the possession. Observations in Ext. P3 is to the effect that, the assigned plot must have situated sandwiched in between the properties gifted. The 3rd respondent had arrived at a conclusion, on the basis of a site inspection conducted, in which it is observed that a portion of the RCC residential building of the 5th respondent falls within the assigned land. It is further found that the land in question contains Bore well, Pump shed, Coconut trees and Jack trees claimed to be in possession of the 5th respondent and therefore there is evidence to show that the land is in the possession of the 5th respondent. The 3rd respondent had remanded the case back to the 4th respondent Tahsildar "to revise the case", after considering all facts in strict conformity with the Kerala Land Assignment Rules. The petitioner challenged Ext. P3 order in revision before the 2nd respondent. Through a cryptic order (Ext. P4), the revision was disposed of finding that the 3rd respondent was convinced that the issue is complicated enough to warrant detailed re-examination and therefore the order of the 3rd respondent has to be complied with. This writ petition is filed challenging Ext. P3 which is confirmed through Ext. P4.

2. In the counter-affidavit filed by the 5th respondent it is contended that the impugned assignment was not within the knowledge of the 5th respondent. The assigned property is situated between properties comprised in RS 139/4 and RS 139/2, and the entire properties are lying as a compact plot surrounded by common boundary in the possession and enjoyment of the 5th respondent and his brothers and sisters. According to the 5th respondent, the assignment in favour of Sri. Abbas was obtained by suppressing facts and by misrepresenting the authorities. It is contended that there is no infirmity with respect to Exts. P3 and P4 orders.

3. Learned counsel for the petitioner had brought to my notice that, the property in question was subject matter of a partition suit filed by the petitioner, and a preliminary decree for partition of the said property has already been passed by the Civil Court. The said decree now stands confirmed in a Second Appeal

disposed of by this Court, subject to result of this writ petition. A copy of the judgment in RSA No. 1371/2011 is made available for my perusal. Observations contained in the judgment in respect of the assigned property is extracted below:

Whatever that be it is not disputed that now there is a challenge to the order dated 18/02/1967 which resulted in Ext. A1. patta. If that challenge succeeds (I am not making any mention on the merit of the contention raised) it follows that first respondent is not entitled to seek partition in the way ordered by the learned Munsiff and confirmed by the learned District Judge in this litigation. At the same time I cannot go into the merits of the contentions raised as regards correctness of assignment order dated 18/02/1967 which is a matter the appropriate authority has to decide and subject to the decision in WP (C) No. 124/2008. It is sufficient to make clear that the preliminary decree which is under challenge in this Second Appeal and the final decree that may be passed pursuant to that, will be subject to the decision on the challenge to the order dated 18/02/1967 leading to issue of Ext. P1, Patta.

4. It is evident that the competent Civil Courts have found that the property in question is partible among the heirs of Sri. Abbas, subject to final outcome with respect to validity of the assignment. Therefore the question to be decided is regarding sustainability of Exts. P3 and P4 orders. Any assignment under the Land Assignment Act, 1961 and the Kerala Land Assignment Rules, 1964 can be cancelled only by recourse to procedure contemplated under Rule 8(3). It provides that the registry will be liable to be cancelled for contraventions enumerated in sub-rules (1) or (2) of Rule 8. Further, the registry can also be cancelled if it is found that the assignment was grossly inequitable or made under a mistake of facts or owing to misrepresentation of facts or in excess of the powers delegated to the assigning authority or that there was an irregularity in the procedure. The power under Rule 8(3) is restricted by various provisos contained therein, which includes that no assignment of land shall be cancelled if annual family income of the transferee occupant does not exceed Rs. 10,000/- and who does not own or possess any landed property anywhere in the State. In the case at hand, the challenge is only on the ground that, as on the date of assignment the original assignee, Sri. Abbas, was not in actual possession of the land. The question remains as to whether the 5th respondent was successful in proving the above aspect.

5. It is evident that the appeal was filed after 34 years from the date of assignment, that too after death of the original assignee. Rule 21 (3) prescribes that an appeal should be filed within 30 days from the date of receipt of the order by the aggrieved party. Sub-rule (4) to Rule 21 provides a discretion on the Appellate Authority to entertain an appeal not submitted within time, if sufficient grounds exist for condoning delay. According to the learned counsel for the 5th respondent the appeal was filed accompanied by a petition seeking condonation of delay. But in Ext. P1 order there is no mention that the Appellate Authority had considered the aspect of delay. When the matter was decided after the

remand, observations contained in Ext. P3 order, with regard to the aspect of delay is as follows:

The issue of maintainability, delay, age of the appellant etc. are not discussed here since these aspects had already been discussed earlier and this case is before this Court for consideration on remanding.

6. From the above observations, it is clear that the Appellate Authority has not applied its mind with respect to condoning the long delay of 34 years. Further, the findings in Ext. P3 are mainly based on factual situation brought out through inspection conducted by the Appellate Authority. But the crucial question is as to whether the original assignee was in possession of the land as on the date of assignment. The observations contained in Ext. P3 is to the effect that the land remains sandwiched between the land covered by the Gift Deed. But it cannot be taken as a basis for presuming that the land was in possession of the 5th respondent or to presume that the original assignee was not in possession of the land at the time of assignment. Factual situation remains that the original assignee was the maternal Grand Father of the 5th respondent and the 5th respondent was only at the age of 7 years at the time of the assignment. It probabilise a situation that, inspite of the Gift Deed executed the Grand Father might not have actually parted with possession of the land covered under the Deed. At any rate, there is absolutely no materials to show that he had parted with possession of the assigned land at any time. It is pertinent to note that in Ext. P4 revisional order the 2nd respondent has not gone into merits of the case. It was merely observed that the issue is complicated enough to warrant a detailed re-examination. Such an attitude taken by the revisional authority in a statutory revision cannot be termed as legally sustainable. Another pertinent aspect which need to be observed is that in the earlier round of litigation the revisional authority had found that the Sub Collector, Kasaragod has reported that, at the time of assignment the land in question was under effective possession of the assignee. The observation contained in Ext. P2 order in this regard is reproduced hereunder:

The Sub Collector, Kasaragod has reported that the assignment was made in favour of the respondent on 18/02/1967 and the appeal petition was filed after a period of 34 years. At the time of assignment the revision petitioner was minor but the guardian of the petitioner should have filed appeal by representing the petitioner at the time of assignment itself. The land in question was under the effective possession of the assignee at the time of assignment. The record of enquiry shows that the house is constructed only 15 years back and other improvement such as coconut trees, jack tree etc. are seen aged as 15 years and 10 years and the assignment was ordered 34 years back, hence the contentions raised by the revision petitioner is wrong. The respondent No. 1 (the assignee) was eligible to get the land assigned at the time of assignment.

7. From the factual situation as enumerated above it is clear that the 5th respondent was not at all successful in proving the ground of challenge against

the assignment. There was no materials available to show the actual position regarding possession of the land during the year 1967. Further, the 5th respondent was not at all successful in effectively explaining the inordinate delay of 34 years caused in filing the appeal. Hence I am of the considered opinion that the impugned orders (Exts. P3 and P4) are totally unsustainable. Even though counsel for 5th respondent canvassed for a remand of the matter, I am of the opinion that no purpose will be achieved by sending the matter for reconsideration, because the factual aspects relating possession of the land which prevailed in the year 1967 cannot be brought out at this point of time. More so, I take note of the fact that competent Civil Courts have already found that the property in question is partible among the family members who are legal heirs of Sri. Abbas. Under the above mentioned circumstances, I hold that Exts. P3 and P4 orders are unsustainable. Accordingly the writ petition is allowed and Exts. P3 and P4 are hereby quashed. It is declared that the land having an extent of 0.53 Acres comprised in RS No. 139/3 of Thekkil Village stands assigned in favour of Sri. Abbas as per order No. DR 10630/66-67/Thekkil dt. 18/02/1967 issued by the 4th respondent, and that the property in question is liable to be partitioned subject to observations contained in the preliminary decree of partition which stands confirmed in RSA. No. 1371/2011.