

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN

&

THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

TUESDAY, THE 22ND DAY OF SEPTEMBER 2015/31ST BHADRA, 1937

W.A.No. 1650 of 2015 () IN WP(C).6498/2011

AGAINST THE JUDGMENT IN WP(C) 6498/2011 of HIGH COURT OF KERALA DATED 06.04.2015.

APPELLANT(S)/PETITIONER :

JOHNY E.C., AGED 65 YEARS,
S/O. CHACKKUNNI, ELANJIPPILLY HOUSE, MELADOOR P.O.,
ALATHUR VILLAGE, MUKUNDAPURAM TALUK,
THRISSUR DISTRICT.

BY ADVS. SRI. BABU JOSEPH KURUVATHAZHA
SRI. ABHILASH P.T.

RESPONDENT(S)/RESPONDENTS :

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1. THE ADDITIONAL DISTRICT MAGISTRATE,
ERNAKULAM, COLLECTORATE, KAKKANAD,
ERNAKULAM, KOCHI-682 030.
 2. KERALA STATE ELECTRICITY BOARD,
REPRESENTED BY ITS ASSISTANT EXECUTIVE ENGINEER,
TRANSMISSION SUB DIVISION, KSEB OFFICE COMPLEX,
CHALAKUDY, PIN-680 307.
 3. THE ASSISTANT EXECUTIVE ENGINEER ,
KSEB TRANSMISSION SUB DIVISION, KSEB OFFICE COMPLEX,
CHALAKUDY, PIN-680 307.
 4. RAMESHAN,
ASSISTANT ENGINEER, KSEB TRANSMISSION SUB DIVISION,
KSEB OFFICE COMPLEX, CHALAKUDY, PIN-680 307.
 5. ELIZABATH MINI,
ASSISTANT ENGINEER, KSEB TRANSMISSION SUB DIVISION,
KSEB OFFICE COMPLEX, CHALAKUDY, PIN-680 307.

R1 BY GOVERNMENT PLEADER, SRI. RENNY STEPHEN CHAMAPARAMBIL
R2 TO R5 BY ADV. SRI. K.M. SATHYANATHA MENON, SC, KSEB

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 09-09-2015, ALONG WITH
WA. 1799/2015, WA. 1847/2015, THE COURT ON 22.09.2015 DELIVERED THE FOLLOWING:

St/-

P.T.O.

C.R.

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

W.A. Nos.1650, 1799 & 1847 of 2015

Dated this the 22nd day of September, 2015

JUDGMENT

Shaji P. Chaly, J.

These writ appeals are filed by the petitioners in W.P.(C) Nos.6498, 12837 & 15111 of 2011 against the judgment dated 06.04.2015. The writ petitions were disposed of by the learned Single Judge by a common judgment and the subject matter of the dispute involved in the appeals are one and the same and therefore we propose to dispose of the writ appeals also by a common judgment. The facts in the subject matter of the dispute are almost similar and therefore wherever required the facts will be stated separately. The facts as narrated in W.A.No.1847 of 2015 is stated hereunder for the disposal of the above writ appeals.

2. Pursuant to a notification issued by the Kerala State Electricity Board (hereinafter referred to as "the Board") to draw a 33 K.V. electric line through the properties of the appellants, Representations were submitted against such

action of the Board. By the representations, appellants suggested alternative routes so as to avoid drawing line through their properties. While the said representations were so pending, appellant in W.A.No.1650 of 2015 had filed W.P. (C) No.14144 of 2010 before this Court and while the writ petition was pending, notices were issued by the 2nd Respondent invoking his powers under Sec.16(1) of the Indian Telegraph Act and thereupon the said writ petition was closed leaving open the right of the said appellant to raise all objections before the 2nd Respondent.

3. Since the proposal to draw the line through the properties of the appellants and others were objected to, necessarily as provided under law, the 1st Respondent sought permission of the 2nd Respondent and thereupon notices were issued to all the objectors by the 2nd Respondent and passed an order dated 09.11.2009. Pursuant to the said order passed by the 2nd Respondent, 1st Respondent has finalized the route and prepared a sketch finalizing to draw the line through the route "ABCDEFGH" in the sketch so prepared. The order of the 2nd Respondent so passed was challenged before this Court in W.P.(C) No.17670 of 2010 and other connected cases. This

Court in W.P.(C) No.17670 of 2010 and connected cases, had set aside the order passed by the 2nd Respondent and directed the 2nd Respondent to pass fresh orders after considering the objections raised by the appellants along with the objections of the other persons also. Thereupon, 2nd Respondent had called the appellants and others for hearing on 08.09.2010, on which date, the appellants filed objections. The 2nd Respondent conducted site inspection on 13.09.2010 and at the time of inspection, the appellants and other alleged aggrieved persons have suggested alternative routes through the public road by which the properties of the appellants and others could be saved.

4. It was also contended that on 10.11.2010, the officers of the Board tried to draw the electric line without any information or any order passed by the 2nd Respondent against the permission sought for by the 1st petitioner. It was further contended that thereafter an order dated 02.11.2010 was received by the appellants against which the appellants have preferred W.P.(C) No.34216 of 2010 and connected writ petitions challenging the said order of the 2nd Respondent. By a judgment dated 12.11.2010, the writ petitions were allowed

and directed the 2nd Respondent to re-consider the whole issue after providing sufficient opportunity of hearing to the appellants and pass fresh orders.

5. Thereafter, on 22.02.2011, the 2nd Respondent had passed an order accepting the route suggested by the 1st Respondent by holding that the route suggested by the K.S.E.B was the most feasible route and the drawing of the line suggested by the appellants and others through the public road was not feasible in view of the narrow width of the public road. It was also found by the 2nd Respondent that if foundations are erected to install the electric post, the width of the public road will be further reduced and the same will cause disturbance to the vehicular traffic. It was also pointed out by the 2nd Respondent that the alternative routes suggested by the appellants have large number of curves, vegetations will be affected more and further the same will affect the residential buildings situated in the said route. Challenging the said order, appellants in W.A.Nos.1799 and 1847 of 2015 have preferred W.P.(C) Nos.6812 and 6846 of 2011 before this Court and on instructions, the learned counsel for the Board had submitted before the Court that the order dated

22.02.2011 was not concerning the properties of the petitioners and therefore recording the same, the writ petitions were closed. It was the further contention of the appellants that even though the submission was so made by the learned Standing Counsel, the 2nd Respondent had issued the very same order dated 22.02.2011, without considering the objections raised by the appellants against the action of the Board. It is thus aggrieved by the said order dated 22.02.2011, the appellants have approached this Court by filing the aforesaid writ petitions.

6. The appellant in W.A.No.1650 of 2015 has filed an application before the learned Single Judge to appoint an Advocate Commissioner and accordingly an Advocate Commissioner was appointed to collect details with regard to the alternative route suggested by the appellants and the Commissioner has filed a report stating that the route suggested by the Board was the most feasible one. The appellants have filed objections to the Commission Report contending that the findings of the Advocate Commissioner were against the true factual situation and the attempt of the Advocate Commissioner was to help the Board officials. An

application was also filed to set aside the Commission Report and to appoint another Advocate Commissioner for the very same purpose. Anyhow, it was not entertained by the learned Single Judge.

7. The appellant in W.A.No.1650 of 2015 had made an additional contention that no order was served on the said appellant and without the same, with the aid and help of police, the 1st Respondent and its officers entered into the property of the appellant and cut the coconut trees and other trees. Anyhow, thereafter he received the order and filed the aforesaid writ petition.

8. Heard the learned counsel appearing for the appellants, learned Standing Counsel for the K.S.E.B and the learned Government Pleader appearing for the 2nd Respondent.

9. Learned counsel for the appellants contended that the alternative route suggested by them was the most feasible route since neither the property of the appellants nor the property of other persons will be affected by the drawing of the line, if the proposed line is drawn through the public road pointed out by the appellants. Appellants have also produced

different sketches showing the alternative routes suggested by each of them. Moreover, appellants have also contended that the properties of the appellants could be saved by drawing underground cables to the Sub Station. Therefore, learned counsel contended that the sketch prepared by the Board to draw the electric line through the properties of the appellants is unsustainable in law and facts.

10. Learned Standing Counsel for the Board contended that the Board had placed all materials before the 2nd Respondent consequent to the resistance put forth by the appellants and thereafter it was taking into account the entire fact situations and materials that the 2nd Respondent has passed the order impugned and therefore the appellants cannot contend that a different view shall be taken by the Court replacing the order passed by the 2nd Respondent. Learned Standing Counsel also contended that the order was passed by the 2nd Respondent by complying with all principles enunciated under law and therefore there is no illegality or other legal infirmities which enable a writ Court to interfere with the order impugned under Article 226 of the Constitution of India. Learned Standing Counsel further contended that the

alternative route suggested by the appellants was inspected by the 2nd Respondent and since there were stiff resistance from the side of the appellants and others, the route suggested by the Board and the alternative route suggested by the appellants were inspected by the District Collector also and it was thus taking into account all the situations that ultimately the impugned order was passed. Moreover, the appellants did not have a case that the action of the Board is actuated by any *malafides* and therefore the order impugned was rightly upheld by the learned Single Judge. Learned Standing Counsel further contended that of the 9 k.m. route, except the last stretch of 750 Metres, the installation of posts and line work were proceeded and consequent to the interim order passed in the writ petitions, the work could not be completed. Learned Standing Counsel also contended that since the property of other persons were involved in the route and only the appellants herein challenged the order impugned, enabled the Board to proceed with the work and therefore if the reliefs sought for by the appellants are allowed, it will cause innumerable difficulties and losses to the Board.

11. Learned Government Pleader contended that while passing the impugned order, the 2nd Respondent has acted *bonafidely* taking into account the objections put forth by the appellants and other affected persons and the order impugned is a speaking order, which by itself is a testimony to show that the objections put forth by the appellants and others were considered by the 2nd Respondent and therefore the learned Single Judge was right in upholding the order impugned.

12. We have considered the rival contentions raised by the parties in the appeal, perused the pleadings and records and the judgment of the learned Single Judge.

13. The learned Single Judge has considered the contentions advanced by the parties and after verifying the documents, report of the Advocate Commissioner and scrutinizing the rival sketches produced by the parties, had come to a definite finding that the impugned order was passed by the 2nd Respondent by taking into account the entire facts, situations, applying the principles of law and provisions of the Telegraph Act r/w Electricity Act and Rules. Learned Single Judge has relied on the Commission Report for the limited purpose of verifying whether the routes suggested by the

appellants were feasible routes alternative to the one suggested by the Board. The learned Single Judge after analysing the sketch produced by the rival parties and the report of the Advocate Commissioner had come to a finding that the route suggested by the appellants through the public road was narrow and lying in a zig-zag manner having lot of curves and uneven width at various points. The learned Single Judge had found that since the public road through which the route was suggested by the appellants was narrow and if post and foundation were erected in the said route, same will cause hindrance to the vehicular traffic. Furthermore, it was found that if the route suggested by the appellants were accepted, the distance of the route will be more by 220 metres. The learned Single Judge has also found that in the impugned order, certain variations were made by the 2nd Respondent so as to have least inconvenience to the appellants. Even though a suggestion was made for drawing underground cable, the Board had objected to the same by contending that the same will cost Rs.60 Lakhs per k.m. and the same was not feasible.

14. Learned counsel for the appellant in W.A.No.1650 of 2015 apart from the contentions raised by the counsel in the other writ petitions, has contended that the learned Single Judge went wrong in relying on the Commission Report, since the same was objected to by the appellants and an application was even filed to set aside the report, which was not even considered even though requested for prior to the disposal of the writ petitions. Therefore, he contended that the learned Single Judge was duty bound to take a decision in the application to set aside the Commission report and in the application to appoint a new Advocate Commissioner to inspect and report the factual matters sought for and having not done so, there was patent illegality in the impugned judgment. Therefore, the learned counsel canvassed us to issue a fresh Commission order in I.A.No.982 of 2015 in W.A.No.1650 of 2015 in order to ascertain the details thereunder. According to us, in the pleadings in the writ petition nor the pleadings in the writ appeal, any *malafides*, unfairness, illegality or irrationality are attributed against the actions of either of the Respondents. The sole contention was that in order to save the property of the appellants, the alternative routes suggested by the

appellants through the public road should have been ordered as a feasible one by the 2nd Respondent. But, from the factual situation and taking into account the findings of the impugned order, learned Single Judge found that the drawal of line through the route suggested by the appellants connecting the public road was not feasible consequent to the peculiar nature and lie of the public road and also taking into account the difficulties faced by the general public as well as the vehicular traffic. Even though learned counsel for the appellants made a faint attempt by producing certain photographs in this appeal, to establish that the route suggested by the appellants have sufficient width for the erection of electric posts as well as for the foundation, we were not impressed by the said argument. The documents and photographs produced never inspired us to reach a different conclusion than the one arrived at by the learned Single Judge.

15. Learned counsel for the appellant in W.A.No.1650 of 2015 insisted that the Interlocutory Application referred supra filed by the appellant should be considered and a report may be drawn accordingly. First of all, we do not find any reason to appoint a fresh Advocate Commissioner to ascertain the details

sought for in the said I.A., since already we have found that the judgment of the learned Single Judge upholding the impugned order of the 2nd Respondent did not suffer from any vice of arbitrariness, illegality or other legal infirmities and therefore it will not be legalistic on our part to appoint a fresh Commissioner in order to ascertain the factual situation as sought for by the appellant. That apart, we have come across a judgment of the Hon'ble Apex Court in '**State of Kerala and others v. Jose M.K.**' [ILR 2015 (3) Kerala 783] by which the Hon'ble Apex Court held that a Writ Court should not appoint Advocate Commissioner in order to conduct a roving enquiry to collect evidence to resolve disputed questions of fact. It was further held that though it may be possible for the Writ Court to appoint a Committee to assist the Court in matters of public interest, the Court cannot do so in adversarial litigation. Already a report was drawn by appointing an Advocate Commissioner and the learned Single Judge overruling the objections raised by the appellants, has relied on the same, even though to a very limited extent only and therefore without setting aside the same a fresh Commissioner cannot be appointed. We have already found that there were no

justifiable reasons to set aside the report of the Commissioner since the learned Single Judge had relied on the Commission report for finding out the factual situations with regard to the alternative route suggested by the appellants in the writ petitions as well as before the 2nd Respondent.

16. After analysing the situation, we are also of the considered opinion that the order passed by the 2nd Respondent was taking into account all the fact situations and bearing in mind the principles of law enunciated in various judicial pronouncements while considering the permission sought for by the Board under the Telegraph Act. This Court had occasion to consider the nature and the extent of power exercised by an authority under Sec.16(1) of the Telegraph Act in various judgments.

17. In the judgment in '**Bharat Plywood & Timber Products Private Ltd.**' [1970 KLT 872 (FB.)] in paragraph 28 of the judgment, it was held as follows:

"28. x x x x x x x
x x x x x x x x

Before passing an order under S.16(1) the District Magistrate has necessarily to issue notice to all persons interested and give them an opportunity to state their objections, if any. Without giving such an opportunity he

will not have any material, at any rate, adequate material to decide whether he should pass an order that the authority shall be permitted."

18. In the judgment in '**Kesavan v. Addl. District Magistrate**' [1986 KLT 394], it was held as follows:

"It is settled law that an authority should act in good faith and fairly listen to both sides, inasmuch as that was a duty which lay on anyone who decided anything. But the authority was not bound to treat such a question as though it were a trial. It could obtain information in any way, which it thought best, always giving a fair opportunity to those who were parties to the controversy to correct or contradict any relevant statement prejudicial to their view."

19. In '**Valsamma Thomas v. Additional District Magistrate**' [1997(2) KLT 979], a Division Bench of this Court had occasion to consider the extent of judicial review against a decision made under Sec.16(1) and held in paragraphs 11 and 12 as follows:

"11. It is also clear from the authorities and judicial decisions that judicial review is directed not against the decision, but is confined to the examination of the decision making process. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after recording fair treatment, reaches, on a matter which it is authorised by law to decide for itself, a conclusion

which is correct in the eyes of the court. Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made.

12. Thus, on a review of the authorities of this question, we come to the following conclusions:

(1) The District Magistrate has to exercise his discretion judicially.

(2) He has to pass the order under S. 16(1) of the Telegraph Act, after hearing the parties and after taking such evidence as is required with regard to the objections raised.

(3) The order passed by the Court should be a speaking order.

(4) The order should reflect the objections raised by the parties and reasons given by the Magistrate for accepting or rejecting the same.

(5) The order should also reflect the materials relied on by the District Magistrate for arriving at the conclusion.

If the discretion is exercised by the District Magistrate as above, then unless it is shown that the findings are perverse or that the proceedings are vitiated by malafides this Court will not be justified in interfering with such orders. This Court will not be justified in substituting its own opinion. It is also worth bearing in mind that this Court has not got technical expertise and will be slow to interfere with such matters."

20. Thus assimilating the principles rendered in the aforesaid judgments, unless and until *malafides*, unfairness and illegalities are shown and established, the order passed by the authority could not be interfered with. Yet another principle that was laid down by the aforesaid judgments was with regard to the violation of the principles of natural justice and none of the appellants have a case that they did not get sufficient opportunity to contest the case before the 2nd Respondent.

21. Normally, a judicial review is confined to the review of the order passed by the administrative authority and ensure that there is no illegality, violation of principles enunciated under law, irrationality and any other legal infirmities warranting interference in a judicial review. The Constitutional Courts should always be careful not to entrench upon the powers conferred on the two other independent wings of the Government viz. the Legislature and the Executive. In a judicial review, a Court is not functioning as an appellate Court to find out the correctness or otherwise of the order and the venture of the Court will be to find out whether the administrative authority has committed any illegalities, or

other legal infirmities. Judicial restraint is a necessary concomitant to the balance of power envisioned by the framers of our Constitution among the three independent organs of the Constitution. It is true that power of judicial review is one of the most significant feature and vibrant mechanism of our Constitution. But a solemn function is to be exercised with utmost care, caution and circumspection, failing which, the equilibrium expected to be maintained among the wings will collapse. On the other hand, if it is found that the authority has committed grave illegalities of an exceptional manner, the Constitutional Courts should not hesitate to stretch its arms to the extent possible and curb the illegalities so caused by the administrative order or action.

22. Therefore according to us, the impugned order passed by the 2nd Respondent was right under law and therefore the dismissal of the writ petitions by the learned Single Judge was justified. Moreover, when the authority prescribed under a statute has finalized a route taking into account the factual and other incidental situations and if there are no illegalities, *malafides* or violation of any of the principles enunciated under law, it was not proper on the part of the writ

Court to interfere with the orders so passed and replace the same with a view formed by the Court. Even if the fact situation tempts the Court exercising power under Article 226 of the Constitution to reach a different conclusion, the Court will not be legally justified in replacing the order of the statutory authority, with its own order, unless and until it finds that, the order suffered from the legal consequences referred above. When the facts of this case are tested against the well established legal principles, we do not find any reason to interfere with the judgment of the learned Single Judge. Therefore, we have no hesitation to hold that the judgment of the learned Single Judge was right in every sense.

Appeals fail and accordingly they are dismissed.

Sd/-
**K. SURENDRA MOHAN
JUDGE**

Sd/-
**SHAJI P. CHALY
JUDGE**

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P.S. to Judge

St/-
22.09.2015