



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

AND

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P. (MD) .No.21182 of 2017

and

W.M.P. (MD) Nos.17452 and 17453 of 2017

Herbert Spencer

: Petitioner

Vs.

- 1.The District Collector,
Collectorate Building,
Nagercoil,
Kanyakumari District-629 001.
- 2.The Tahsildar,
Kalkulam, Thuckalay,
Kanyakumari District - 629 175.
- 3.The Commissioner,
Padmanabhapuram Municipality,
15-60, Palace Road,
Thuckalay,
Kanyakumari District - 629 175.
- 4.The Superintending Engineer,
National Highways,
No.10, 13th Cross Street,
Maharajanagar,
Tirunelveli-627 011,
Tirunelveli District.
- 5.The Assistant Divisional Engineer,
National Highways,
Salt Street, Near Poorvika Mobile Shop,
Thuckalay - 629 175.

: Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India praying for the issue of a Writ of Certiorari, to call for the records relating to the impugned proceedings issued by the fifth Respondent Assistant Divisional Engineer in Ka.Na.25/2017/Evaa, dated 24.10.2017 (received on 29.10.2017) and quash the same.



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For Petitioner

: Mr. Isaac Mohanlal,
Senior Counsel,
For M/s. Isaac Chambers

For Respondents

: Mr. M. Govindan,
Special Government Pleader

O R D E R

[Order of the Court was made by **M. VENUGOPAL, J.**]

Heard both sides.

2. No counter is filed on behalf of the Respondents 1 to 5.

3. By consent, the main Writ Petition itself is taken up for final disposal during the time of admission.

4. According to the Petitioner, a strip of land measuring 9.366 Cents in Re-Survey No. B7/124 in Thuckalay Village, Padmanabhapuram Municipal Limit, Kanyakumari District lying East-West along the Northern Border of the Trivandrum - Nagercoil Road (NH.47) (Opposite to the 'Court House' in Padmanabhapuram Municipal Town at Thuckalay, Nagercoil, Kanyakumari District) [hereinafter referred to as 'Property A'] was part of the registered holding of his maternal grandfather, viz., Late. Thiru. Vaithiyanathan, which lay on the North of National Highway. It is comprised in Lekkom 321 of Thuckalay Village of the Former Travancore - Cochin State.

5. The plea of the Petitioner is that when the lands were originally surveyed in the Travancore-Cochin State, the above said property 'A' lying in the North of the said road was blocked in old Survey No. 3153 and it was classified as the patta holding of his grandfather Late. Thiru. Vaithiyanathan. The road in the South of the land i.e., Trivandrum - Nagercoil Road was surveyed as Survey No. 3152 and classified as 'Poramboke'. Later, the road survey was, however, re-opened and re-surveyed and the property 'A' of the Petitioner's grandfather in old Survey No. 3153 was wrongly blocked with the poramboke property in Survey No. 3152. Pursuant to the wrong blocking of the property 'A', the Revenue Authorities initiated land encroachment case in poramboke File No. 20/1108 M.E. (1933) against the Petitioner's grandfather on the charge that he was in unauthorized occupation of poramboke land for 35 years by putting up the buildings.

6. Added further, the Petitioner takes a stand that his grandfather Late. Vaithiyanathan was found guilty of encroachment and 70 Fanams was recovered as fine from him by the Tahsildar of Kalkulam. Later, he preferred Appeals before the Division Paishkar and the Land Revenue Commissioner and he failed in those Appeals. Thereupon, he laid a Civil Suit in O.S. No. 55 of 1113 M.E. before the



District Court, Nagercoil, assailing the land encroachment proceedings against him.

7. The suit came to be decreed in favour of the Petitioner's grandfather and his title and possession over the property 'A' in Old Survey No.3153 was declared and the order of 1943 in the Land Encroachment Case was set aside. Further, the State was directed to refund the 70 Fanams recovered from the Petitioner's grandfather. Aggrieved over the same, the State of Travancore - Cochin preferred Appeal in A.S.No.47/1124 M.E., which was, later, dismissed with cost in the year 1953. In the meanwhile, the Petitioner's grandfather Vaithiyanathan died on 13.05.1939. However, the survey records pertaining to the property 'A' remained uncorrected and the said property 'A' in old Survey No.3153 was again classified as poramboke and re-surveyed together with the National Highways road under the Tamil Nadu (Transferred) Ryotwari Settlement Act, 1964. Under the re-settlement, the said National Highway Road was correlated to the New Survey No.B7/124 comprising old Survey Nos.3152 and 3153 and part Survey Nos.3145 and 3149.

8. The Petitioner's grandfather Vaithiyanathan had five children. The Petitioner's father died on 05.09.1994. Later, the Petitioner (owner of the land in Re-Survey No.B7/93), one M.Vaithyanathan, S/o.Late Maria Ambrose (owner of the land in Re-Survey No.B7/92) and one S.Wilfred Sam Joseph, S/o.Late V.Stanislaus (owner of the land in Re-Survey No.B7/91) became the owners of the land measuring an extent of 5 Cents in the Western side of the said property 'A' (abutting the Petitioner's patta land in the above said survey numbers) which are adjoining the aforesaid lands owned by them (hereinafter referred to as property 'B').

9. Because of the wrong blocking of the property 'A' with the road in New Re-Survey No.B7/124, suddenly, in the year 1999, the National Highways officials wrongly demarcated and classified the property 'B' as National Highways property and took steps to remove the buildings in the said property.

10. The Petitioner in the present Writ Petition has come out with a plea that he along with one Vaithyanathan and one Wilfred Sam Joseph, the owners of the said property 'B' and the properties in Re-Survey Nos.B7/93, 92 and 91 respectively in Thuckalay Village, Padmanabhapuram Municipal Limit, Kanyakumari District, were constrained to file a Civil Suit before the Learned Principal District Munsif, Padmanabhapuram, in O.S.No.53 of 1999, seeking a relief of declaration of title and possession over the property 'B', demarcation of the property in Re-Survey No.B7/124 from the Trivandrum- Nagercoil National Highways road in the South and also for an injunction against the Defendants therein from disturbing the peaceful possession of the property. The Respondents 1, 3 and 4 herein were the party Defendants 1 to 3 in the above said Suit and the suit was decreed in favour of the Plaintiffs as per Judgment dated 01.09.2009 by granting the following reliefs:



"1. that the Suit be and hereby is declared the Plaintiffs title and possession over the 'B' Schedule Property.

2. that the Suit be and hereby is to demarcate the 'B' Schedule Property from Trivandrum - Nagercoil road in the South.

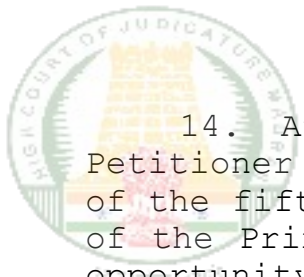
3. that the Defendants be and hereby are restrained by an order of Permanent Injunction restraining the Defendants from trespassing into the Suit 'B' Schedule Property or causing any disturbance to their peaceful possession.

4. and that there be no cost of the Suit."

11. The Respondents 1,3 and 4 have not preferred any Appeal as against the Judgment dated 01.09.2009 in O.S.No.53 of 1999 on the file of the Trial Court and the judgment of the Trial Court had attained finality in the subject matter in issue. Subsequently, the petitioner along with M.Vaithyanathan and Wilfred Sam Joseph, addressed a representation dated 10.03.2011 to the second Respondent/Tahsildar, Kalkulam, Thuckalay, Kanyakumari District, with a request to carry out the necessary changes in the revenue records by sub-dividing the property 'B' from the road Survey No.B7/124 and to issue patta in their name, in tune with the Judgment and Decree dated 01.09.2009 in O.S.No.53 of 1999. However, there was no positive response.

12. Even, the application dated 19.03.2011 submitted by M.Vaithyanathan, made under the Right to Information Act, 2005, to the second Respondent/Tahsildar, Kalkulam, Thuckalay, Kanyakumari District, seeking the status and the actions taken on his representation dated 10.03.2011, had not met with any positive response. Since there was no progress for more than two years, he filed an Appeal under the Right to Information Act, 2005 on 15.07.2013. The Public Information Officer, through his letter dated 06.08.2013, informed the said Vaithyanathan that the Assistant Engineer, Thuckalay, had sought No Objection Certificate from the Assistant Divisional Engineer, National Highways, Nagercoil, through his letter dated 06.08.2013 and that the actions for the sub-division allotment of Re-Survey number and issuance of patta would follow, after receiving the No-Objection Certificate. However, there was no action taken either on the part of the Revenue Authorities or on the part of National Highways Authorities.

13. When that be the fact situation, to the shock and dismay of the Petitioner, the fifth Respondent/Assistant Divisional Engineer, National Highways, Thuckalay, had issued the present impugned proceedings dated 24.10.2017 (received on 29.10.2017) requiring the Petitioner to remove the encroachment in the property 'B' measuring an extent of 0.00.10 Hectares (approximately 2 Acres and 49 Cents), within 15 days from the date of receipt of copy of the notice, etc.



14. At this juncture, the Learned Senior Counsel for the Petitioner submits that the impugned notice/order dated 24.10.2017 of the fifth Respondent is an illegal one, because there is negation of the Principles of Natural Justice and in fact, no notice or any opportunity of hearing was provided to the Petitioner prior to the issuance of the impugned notice/order. Even, the report purported to have been submitted by the second Respondent/Thasildar, Kalkulam Thuckalay, Kanyakumari District, to the effect that the Petitioner had encroached into the land belonging to the National Highways measuring an extent of 0.00.10 Hectares in Survey No.B7/124, NH-47, Padmanabhapuram 'A' Village, Kalkulam Taluk, Kanyakumari District, was not furnished to him.

15. The pith and substance of the plea of the Petitioner is that the impugned notice/order dated 24.10.2017 was passed by the fifth Respondent without application of mind. Added further, the fifth Respondent had not considered or taken into account the Judgment and Decree of the Trial Court in O.S.No.53 of 1999, dated 01.09.2009.

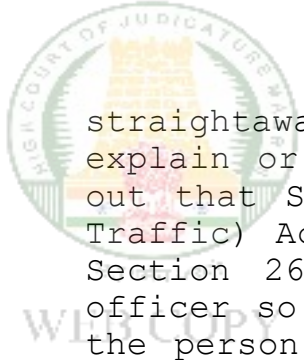
16. Besides the above, the Learned Senior Counsel for the Petitioner brings it to the notice of this Court that the impugned notice/order dated 24.10.2017 of the fifth Respondent is in breach of Section 26 of the Control of National Highways (Land and Traffic) Act, 2002, which enjoins the procedure in regard to the issuance of notice for removal of encroachment on the Highways.

17. Apart from that, the Petitioner had issued registered legal notices dated 09.11.2017 to the Respondents 2,4 and 5, explaining and pointing out the sequence of events leading to the passing of Decree in O.S.No.53 of 1999, dated 01.09.2009.

18. Per contra, it is the submission of the Learned Special Government Pleader appearing for the Respondents that the impugned notice/order dated 24.10.2017 of the fifth Respondent is only a show cause notice. As a matter of fact, the Revenue Officials had conducted survey in the presence of the Petitioner.

19. At this stage, a perusal of the impugned notice/order dated 24.10.2017 of the fifth Respondent by this Court clearly indicates that the Petitioner was directed to remove the encroachment in respect of Courier Office, Xerox and Bakery Shop, within 15 days from the date of receipt of the notice voluntarily by himself, failing which, he was informed that further action would be taken departmentally and the encroachment in question would be removed.

20. Nowhere, in the impugned notice/order dated 24.10.2017, the Petitioner was required to submit his explanation/representation/objection to be raised by him in regard to the purported encroachment. Obviously, the impugned notice/order dated 24.10.2017 was issued to and in favour of the Petitioner



straightaway without providing an opportunity to the Petitioner to explain or justify his stand. In this regard, it is to be pointed out that Section 26 of the Control of National Highways (Land and Traffic) Act, 2002, speaks of 'removal of unauthorized occupation'. Section 26(2) points out that the Highway Administration or the officer so authorised shall serve a notice in a prescribed form on the person causing or responsible for such unauthorised occupation requiring him to remove such unauthorised occupation and to restore such highway land in its original position as before the unauthorized occupation within the period specified in the notice.

21. Undoubtedly, Section 26(3) points out that the place and time of hearing of any representation is to be mentioned and failure to comply with such notice will only render the person specified in the notice liable to penalty and summary eviction from the highway land in respect of which such notice is issued under Sub-Section (6).

22. Section 26(6) deals with the majority of ultimate action to be taken by the authorities concerned.

23. Considering the fact that the Petitioner was not provided with an opportunity to justify his stand or to submit his explanation to the impugned notice/order dated 24.10.2017 issued by the fifth Respondent, this Court, at this stage, directs the Petitioner to submit his explanation, within a period of two weeks from the date of receipt of copy of this order. Thereafter, on receipt of the representation from the Petitioner, within the determined by this Court, the fifth Respondent/Assistant Divisional Engineer, National Highways, Thuckalay, is to consider the same with all seriousness and earnestness and also to look into the documents, viz., the Decree dated 01.09.2009 in O.S.No.53 of 1999 and to advert to the same at the time of passing the final orders, within a period of four weeks thereafter. It cannot be gainsaid that the Petitioner and others concerned, if any, shall be provided with a reasonable opportunity of hearing etc, by the fifth Respondent, before passing the final orders in the subject matter in issue. Till final orders are passed in the subject matter in issue, it is abundantly made quite clear that the possession of the Petitioner in respect of the subject property shall not be disturbed by anyone, by any means whatsoever.

24. With the aforesaid observation(s)/direction(s), the Writ Petition stands disposed of. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CRL. SIDE)

/True Copy/



To

1.The District Collector,
Collectorate Building,
Nagercoil,
Kanyakumari District-629 001.

2.The Tahsildar,
Kalkulam, Thuckalay,
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Tirunelveli District.

5.The Assistant Divisional Engineer,
National Highways,
Salt Street, Near Poorvika Mobile Shop,
Thuckalay - 629 175.

+1cc to M/s.ISAAC CHAMBERS Advocates in SR. No. 87773

+1cc to THE SPECIAL GOVERNMENT PLEADER in SR. No. 87960

SML

JS/KP/SAR.2/4.12.2017/7P-8C

Order made in
W.P. (MD) .No.21182 of 2017
Dated:- 16.11.2017