2024:KER:10939

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE VIJU ABRAHAM

MONDAY, THE 12TH DAY OF FEBRUARY 2024 / 23RD MAGHA, 1945

WP(C) NO. 3302 OF 2023

PETITIONER:

TERESA MARY GEORGE,AGED 60 YEARS
POORNA NAGAR, HIG-21, ALOOKARAN HOUSE,
ALUVA, ALUVA POST, ERNAKULAM DISTRICT,
PIN - 683101

BY ADV JESWIN P.VARGHESE

RESPONDENTS:

1 STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
DEPARTMENT OF LAND REVENUE, SECRETARIAT,
TRIVANDRUM, PIN - 695001

2 THE DISTRICT COLLECTOR
CIVIL STATION, KAKKANAD (POST), ERNAKULAM,
COCHIN - 30, PIN - 682030

3 THE TAHSILDAR
TALUK OFFICE, ALUVA (POST), ERNAKULAM DISTRICT,
PIN - 683101

4 THE TAHSILDAR (LAND REFORMS)
TALUK OFFICE, ALUVA POST, ERNAKULAM DISTRICT,
PIN - 683101

5 THE TALUK SURVEYOR
TALUK OFFICE, ALUVA POST, ERNAKULAM DISTRICT,
PIN - 683101

6 THE VILLAGE OFFICER
VILLAGE OFFICE, ALUVA POST, ERNAKULAM DISTRICT,
PIN - 683101

7 RAPHEL LAZAR
S/O (LATE) OUSEPH LAZAR, ALOOKARAN HOUSE,
EAST KADUNGALOOR KARA, ALUVA WEST VILLAGE,
ALUVA TALUK, U.C. COLLEGE (POST), ALUVA,
ERNAKULAM DISTRICT, PIN - 683102

8 JOSE LAZAR
S/O (LATE) OUSEPH LAZAR, ALOOKARAN HOUSE,
EAST KADUNGALOOR KARA, ALUVA WEST VILLAGE,

ALUVA TALUK, U.C. COLLEGE (POST),
ALUVA, ERNAKULAM DISTRICT, PIN - 683102

9 THE STATION HOUSE OFFICER
ALUVA POLICE STATION, ALUVA POST,
ERNAKULAM DISTRICT, PIN - 683101

R7 BY ADV.JAYASANKER B

OTHER PRESENT:

GP - AJITH VISWANATHAN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 12.02.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

VIJU ABRAHAM, J.

.....

W.P (C) No.3302 of 2023

.....

Dated this the 12th day of February, 2024

JUDGMENT

The above writ petition is filed challenging Ext.P8 order issued by the 4th respondent and for a consequential direction to respondents 3 and 6 to fix survey marks on the boundaries of plot B described in Ext.P3 survey plan prepared by the 5th respondent, if required, after seeking assistance of the police in case of any obstruction by anyone including respondents 7 and 8.

2. Brief facts necessary for the disposal of the writ petition are as follows: Petitioner's late husband has obtained 3.24 Ares (8 cents) of land by virtue of a Will executed by his mother which was registered as document no.180/1998 of SRO Thripunithura. Petitioner's husband died on 10.12.2007 and thereafter on an application submitted by the petitioner and her children, the 3rd respondent has mutated the property in their name as per Ext.P1 order. Pursuant to the same, basic land tax in respect of the above said property was accepted from them as is

evident from Ext.P2 receipt. While so, respondents 7 and 8 who are brothers of the petitioner's late husband attempted to trespass into the aforesaid property whereby the petitioner and her children were constrained to approach the Sub Court, North Paravur by filing O.S.No.524 of 2008 against them seeking a decree for fixation of boundaries of abovesaid 3.24 Ares of land which is described as plaint B schedule property therein. Pending the suit, a survey commission was taken out and the 5th respondent visited the property and demarcated its boundaries and also prepared Ext.P3 survey plan and on measurement, a small extent of land was additionally found over and above the land described in the Will and the said extent of land was distributed equally among the parties and as such each party got additional 0.23 Ares of land. Subsequently, the suit filed as O.S.No.524 of 2008 was decreed on the basis of a compromise wherein respondents 7 and 8 who are the defendants in the suit have agreed to decree the suit in accordance with Ext.P3 survey plan and the Additional Sub Court, North Paravur disposed of the suit as per Ext.P4 judgment based on the said compromise. The 4th respondent thereafter effected mutation as per Ext.P5 with respect to the additional 0.23 Ares of land in favour of the petitioner and her children and basic tax in respect of the same was accepted as is evident from Ext.P6 receipt. Subsequently, the petitioner approached the 3rd respondent with Ext.P7 application to fix

survey marks (survey stones) on the boundaries of plot B described in Ext.P3 survey plan. Petitioner contends that respondents 3 to 5 are statutorily obliged to do physical demarcation of the boundaries of plot B described in Ext.P3 survey plan which is prepared by the 5th respondent inasmuch as respondents 7 and 8 have accepted the said plan and consequently Ext.P4 judgment was passed based on the compromise. But the said application was rejected by the 4th respondent as per Ext.P8 order stating that the request now made by the petitioner is for execution of the terms of the decree and therefore they should approach the execution court by filing an appropriate petition for execution of the decree. It is in the said circumstance that the petitioner has approached this Court.

3. Petitioner submits that Ext.P3 survey plan is prepared by the 5th respondent and all parties to the suit have agreed to accept the same and consequently Ext.P4 judgment was passed by the Sub Court, North Paravur. The present request of the petitioner before the 4th respondent is to fix survey marks on the boundaries of plot B in Ext.P3 survey plan. Since there is no dispute by either side regarding Ext.P3 survey plan and that Ext.P4 judgment of the competent civil court has attained finality, the petitioner cannot be asked to approach the execution court for the purpose of demarcation of the property.

4. A detailed counter affidavit has been filed by the 7th respondent

wherein a preliminary objection was raised that the writ petition is not maintainable inasmuch a public law remedy under Article 226 of the Constitution of India cannot be invoked when there is an effective mechanism provided for the remedy sought. It is further contended that since there is a decree passed by a competent civil court and a mechanism has been provided under Order XXI of the Code of Civil Procedure, 1908, a decree passed by a civil court cannot be executed by the issuance of a writ of mandamus under Article 226 of the Constitution of India. It is also contended that the petitioner has not taken any steps in this regard. It is further contended that by filing the above writ petition, the petitioner is attempting to execute the decree in O.S.No.524 of 2008 on the file of the Sub Court, North Paravur in a roundabout manner without moving an execution petition before the competent civil court where the parties can raise their defence/objections regarding the manner of measurement conducted by the surveyor appointed by the court and any disparity in the area and other relevant matters and get an adjudication on the same which will give a quietus to the matter in issue. Therefore the present writ petition filed by the petitioner under Article 226 of the Constitution of India is not maintainable and therefore sought for dismissal of the same.

5. I have heard the learned counsel appearing for the petitioner, 7th respondent as well as the learned Government Pleader.

6. It is settled law that the public law remedy under Article 226 of the Constitution of India cannot be invoked for execution of a decree passed by a competent civil court inasmuch as an effective mechanism is provided under Order XXI of the Code of Civil Procedure, 1908. Admittedly, the petitioner has not invoked the said remedy. The Apex Court in **Ghan Shyam Das Gupta and another v. Anant Kumar Sinha and others, 1991 KHC 1030** has held as follows:

> *"8. The principle as to when the High Court should exercise its special jurisdiction under Art. 226 and when to refuse to do so on the ground of availability of an alternative remedy has been settled by a long line of cases. The remedy provided under Art.226 is not intended to supersede the modes of obtaining relief before a Civil Court or to deny defences legitimately open in such actions. As was observed in State of Andhra Pradesh v. Chitra Venkata Rao [1976] 1 SCR 521:AIR 1975 SC 2151] the jurisdiction to issue a writ of certiorari is supervisory in nature and is not meant for correcting errors like an appellate court. In Thansingh Nathmal v. A. Mazid: [1964] 6 SCR 654: AIR 1964 SC 1419] a case dealing with liability to pay sales tax, the appellants without following the statutory remedy under the Sales Tax Act, moved the High Court under Art.226 on the ground that the Act was ultra vires. The challenge was rejected. Another contention, namely, that the finding of the Commissioner that the goods were actually within the State at the time of the contract was based on no evidence and was purely speculative, was also raised. This ground also failed before the High Court and the writ petition was dismissed. Approving the decision, this Court observed that if the appellants had persued the statutory remedy under the Act and the question had been referred to the High Court, the Court could have appropriately advised the Commissioner, but not having done so, the High Court could not be asked to assume the role of an appellate court over the decision of*

the Commissioner either on a question of fact or even of law. Again when a learned Single Judge of the High Court and on appeal a Division Bench proceeded to examine the correctness of an order in relation to grant of a permit to ply a vehicle under the Motor Vehicles Act, it was observed by this Court in M.Naina Mohammed v. K.A.Natarajan [1976] 1 SCR 102: AIR 1975 SC 1867], that the power under Art.226 is supervisory in nature and the Judges at both the tiers had unwittingly slipped into the subtle but, fatal, error of exercising a kind of appellate review. So far the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all its aspects. The numerous rules of O.21 of the Code take care of different situations, providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the civil court. The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes, and the Judge being entrusted exclusively with administration of justice, is expected to do better. It will be, therefore, difficult to find a case where interference in writ jurisdiction for granting (relief) to a judgment-debtor or a claimant objector can be justified. The R.97 to 106 of O.21 envisage questions as in the present appeal to be determined on the basis of evidence to be led by the parties and after the 1976 Amendment, the decision has been made appealable like a decree. The High Court, in the present case, therefore, ought not to have embarked upon a decision of the writ petition on merits, and should have refused to exercise its special jurisdiction on the ground of alternative remedy before the civil court."

(underline supplied)

7. This Court in **Corporation of Kochi v. Thomas John Kithu and others, 2020 (3) KHC 515** has held that public law remedy under Article

226 of the Constitution of India cannot be invoked in a case where there is a mechanism provided for execution of a decree.

8. I find considerable force in the contention of the learned counsel appearing for the 7th respondent that the attempt of the petitioner is to execute the decree in O.S.No.524 of 2008 on the file of the Sub Court, North Paravur in a roundabout manner without moving an execution petition in a competent civil court. The contention raised by the 7th respondent that if such an execution petition is filed before a competent civil court, the parties can raise their defence/objections regarding the manner of the measurement conducted by the surveyor appointed by the court and also about any disparity in the area and other relevant matters and get an adjudication on the same so as to give a quietus to the matter in issue, is only to be accepted.

9. When an effective alternative remedy is available to the petitioner to approach the competent civil court under Order XXI of the Code of Civil Procedure, 1908 for executing the decree passed by a civil court, I am of the opinion that they cannot approach this Court under Article 226 of the Constitution of India seeking a writ of mandamus to execute the decree passed by the civil court. In view of the above, I am of the opinion that the petitioner is not entitled to any of the reliefs sought for in the writ petition.

Accordingly, the above writ petition is dismissed making it clear

that the dismissal of the same will not affect the right of the petitioner, if any, available under law, to file a petition before the competent court for execution of the decree.

Sd/-
VIJU ABRAHAM
JUDGE

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APPENDIX OF WP(C) 3302/2023

PETITIONER EXHIBITS

Exhibit P1	A TRUE COPY OF ORDER NO. D2-4369/008/KDIS PASSED BY THE 3RD RESPONDENT DATED 31/07/2008
Exhibit P2	A TRUE COPY OF LAND TAX RECEIPT NO. KL07041505049/20220 ISSUED BY THE 6TH RESPONDENT DATED 24/09/2020
Exhibit P3	A TRUE COPY OF THE SURVEY PLAN PREPARED BY THE 5TH RESPONDENT AND PRODUCED IN O.S NO. 524/2008 BEFORE ADDITIONAL SUB COURT, NORTH PARAVUR DATED 10/02/2020
Exhibit P4	A TRUE COPY OF THE JUDGMENT IN O.S NO. 524/2008 PASSED BY ADDITIONAL SUB COURT, NORTH PARAVUR DATED 10/11/2021
Exhibit P5	A TRUE COPY OF ORDER NO. D.2.61/22 PASSED BY THE 4TH RESPONDENT DATED 23/05/2022
Exhibit P6	A TRUE COPY OF LAND TAX RECEIPT NO. KL07041505092/2022 ISSUED BY THE 6TH RESPONDENT DATED 26/05/2022
Exhibit P7	A TRUE COPY OF THE APPLICATION SUBMITTED ON BEHALF OF THE PETITIONER BEFORE 3RD RESPONDENT DATED 28/09/2022
Exhibit P8	A TRUE COPY OF LETTER NO.D.4-3879/22 ISSUED BY 4TH RESPONDENT DATED 29/11/2022
Annexure	Email Receipt