

(1976) 02 MAD CK 0035
In the Madras High Court

Chinnappa Asari

APPELLANT

Vs

The Divisional Panchayat Officer

RESPONDENT

Date of Decision : 24-02-1976

Acts Referred:

Citation : (1976) ILR (Mad) 300 : (1977) 90 LW 1 : (1977) 1 MLJ 328

Hon'ble Judges : T. Ramaprasada Rao, J

Bench : Division Bench

Judgement

T. Ramaprasada Rao, J.—We shall first take C.M. A No. 583 of 1974. This appeal is directed against the judgment of the learned District

Judge of Chingleput in O.P. No. 28 of 1968 on his file. The appeal itself comes up to this Court under a special statutory provision made under

Sub-section (2) of Section 178 of the Tamil Nadu Panchayats Act, 1958, by virtue of the powers vested in the State Government in relation to

Clause (xvi-a) of that section. Particular provision provides that an appeal shall lie to the High Court against orders of any Principal Civil Court of

Original Jurisdiction which is called upon to decide whether a disallowance, surcharge or charge made by a Panchayat Union Council or the

Executive Authority of the Panchayat under the provisions of the Tamil Nadu Panchayats Act, 1958, is correct or not. We shall presently refer to

the said provision.

2. The petitioner functioned as President of Kakkalur Village Panchayat for some time in 1958. Thereafter a new President took charge of it from

him. Again in 1965, he became the President of the Panchayat, but it appears he resigned his office in the very same year. In or about 1968 and in

relation to matters which happened about 14 or 15 years ago, to wit, during the

years 1951 to 1954, he received a surcharge notice on 4th April, 1968 calling upon him to answer for certain excessive or illegal expenditure incurred by him when he was functioning as President of the Kakkalur Village Panchayat. It is common ground that the above notice was issued after the auditor inspected the accounts of the Panchayat for the years 1954-55 on the basis of a report of surcharge given by the auditor. The three items to which the respondent was made answerable were expenditure relating to the formation of a road between Thozur Street and Gandhamedu Street under the rural welfare scheme, expenditure relating to the construction of a community hall from Government contribution and donation given by the Governors of Bombay and Madras and expenditure in relation to his own traveling, allowance. On receipt of the said notice on 4th April, 1968, the respondent fully explained each of the above items. While pointing out that he was not to be blamed nor can be called upon to account for the above items of expenditure, the respondent recalled that all such expenses alleged to be excessive or irregular were incurred about 15 years earlier and the claim is barred by limitation. He would also say that the records were handed over by him when a new President took over charge and that there was a tampering with the accounts also. Regarding the second item, the specific case of the respondent was that the relevant pages in the day-book for the period 1st October, 1937 to 10th December, 1954 were missing and whilst claiming that he was not in any way responsible for it, he pleaded his inability to give his further explanation. As regards the third item, he pleaded that he properly accounted for the same. He also raised a legal contention that during the period when he functioned as President of the Panchayat, there were no rules whereunder surcharge proceedings could be taken as initiated by the Revenue Divisional Officer, Tiruvallur as the appropriate authority functioning for the Panchayat, and as the surcharge rules came into force only on and from 2nd September 1964, the proceedings by themselves were vitiated. He attacked the surcharge order on the above grounds. No counter was filed by the appellant herein and the learned District Judge framed the following points for consideration:

1. Whether the petitioner is entitled to have the surcharge order in respect of the three items set aside?.

2. Whether the claim of the respondent is barred by limitation?

He agreed with the respondent herein that under the old Act there were no rules under which surcharge proceedings could be taken and that there

is no provision in the new Panchayats Act of 1958 which would enable the appropriate statutory authority to initiate proceedings in respect of such

alleged acts of malfeasance in relation to works done during the period when the old Act was in force. He therefore set aside the demand based on

the surcharge report. The learned Judge also dealt with the question whether the claim was barred by limitation, and he held in favour of the

petitioner before him. Since the surcharge order was so set aside by the learned District Judge, the Revenue Divisional Officer has preferred this

appeal.

3. As regards the question whether the claim is barred by limitation, we shall deal with this aspect in C.M.A. No. 465 of 1974. Suffice it, however

in this appeal, to deal with the other aspect whether there was power at all in the Panchayat or the statutory functionary under it to initiate surcharge

proceedings in relation to matters which were executed and completed when the old Madras Village Panchayats Act, 1950 was in force.

4. It is common ground that the works in question were completed prior to the passing of the Tamil Nadu Panchayats Act, 1958 and even the

travelling allowance said to have been utilised without authority by the respondent in this appeal relates to that period. The question for

consideration is whether the provisions of the Tamil Nadu Panchayats Act, 1958 can be pressed into service in order to investigate and recover

certain monies said to have been misapplied by the officers of the Panchayat when they functioned as such under the Madras Village Panchayats

Act of 1950.

5. Section 112 (2) (xi) of the Madras Village Panchayats Act of 1950 provided that the State Government shall in addition to the rule-making

powers conferred on them by any other provisions contained in that Act, have power to make rules generally to carry out the purposes of the Act,

and in particular and inter alia without prejudice to the generality of the foregoing power, may make rules as to the powers of auditors to disallow

and surcharge items, appeals against order of disallowance or surcharge, and the recovery of sums disallowed or surcharged. It is not necessary

for us to consider the rule-framed under this provision. It is sufficient for our purpose to say that when the 1950 Act was passed, there was indeed

the power in the auditor to disallow and surcharge items, etc. It is also equally common ground that under the amended Act of 1958 Section 112

(2) (xi) was omitted. The result, is that on the date when the Tamil Nadu Panchayats Act. (XXXV of 1958) was passed, there was no rule which

authorised the Panchayat to initiate such surcharge proceedings or cause such investigation to be made. This position continued till 1964 when by

Tamil Nadu Act XVIII of 1964 this power was re-introduced in the Act XXXV of 1958 in a similar provision more or less in pari materia with

Section 112 of the Madras Village Panchayats Act, 1950. Clause (xvi-a) of Sub-section (2) of Section 178 which deals with the power of the

Government to make rules and which is similar to the power in the Government contemplated in Section 112 reads as follows:

The Government may make rules as to the powers of auditors to disallow and surcharge items, appeals against orders of disallowance or

surcharge, and recovery of sums disallowed or surcharged.

It is by virtue of this delegated power in the subordinate body. G.O. Ms. No. 1,127 L.A, dated, 18th May, 1965 was passed. This G.O. was in

exercise of the powers conferred by Clause (xvi-a) of Sub-section (2) of Section 178 of the Tamil Nadu Panchayats Act (XXXV of 1958)

making the rules relating to power of auditors in the matter of surcharge under the Tamil Nadu Panchayats Act. These rules were to be deemed to

have come into force on the 2nd September, 1964. We shall at a later stage consider certain relevant clauses of these rules. In so far as this appeal

is concerned, it is therefore clear, that during 1957 to 1964, no action could have been taken by the Panchayat against the respondent in this

appeal because of lack of power. The question, as already posed, is whether under the new Act such a power could be exercised when it was

granted for the first time by the Legislature only in 1964. Learned Government Pleader relies upon Section 8 of the Madras General Clauses Act,

1891, to contend that such a power is available to the Panchayat. In particular, he would rely upon Section 8 (f). Section 8 of the Madras General

Clauses Act deals with a situation where there has been a repeal of earlier enactment. Clauses (a) to (e) refer to certain rights, privileges,

obligations, liabilities, fines, penalties, forfeiture and Punishment which were expressly provided for in the repealed enactment. In these

circumstances, Clause 8 (f) says that where any Act repeals any other enactment, then the repeal shall not affect any investigation, legal proceeding

or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment, etc. The primary requirement for the

invocation of the residuary power u/s 8 of the Madras General Clauses Act is the pre-existence of such power in the repealed enactment. If,

therefore, in the repealed Act, no such power is there, no such right or privilege could be claimed then in our view, any investigation, legal

proceeding or remedy in respect of such a right, privilege, obligation etc., which was not provided for in the quondam Act cannot be undertaken.

On the date when Act XXXV of 1958 came into force, it is common ground, there was no power in the Panchayat to investigate and institute legal

proceedings in connection with the alleged right of the Panchayat to recover money, discovered to be accountable by persons in charge of the

Panchayat under the previous Act. That being the position, it was idle on the part of the Panchayat in 1968 to serve a notice on the respondent and

call upon to him to explain the alleged misapplication of funds of the Panchayat during 1951 to 1954. On this short ground therefore the appeal by

the Revenue Divisional Officer have to be dismissed. We have already said that as regards the question whether the cause of action to claim such

an amount is barred by limitation or not, it is unnecessary for us to go into in this appeal as we intend dealing with it at length in the other Civil

Miscellaneous Appeal which was also heard along with this appeal. C.M.A. No. 583 of 1974 is therefore dismissed but there will be no order as

to costs.

6. C.M.A. No. 465 of 1974.--This is an appeal against the judgment of the learned District Judge of Coimbatore (East) which is again an appeal

under the provisions of the Surcharge Rules succinctly referred to by us in the first appeal disposed of earlier. The short and relevant facts are as

follows: The appellant therein was President of Thoranavavi Panchayat from 1963 to 1965. In respect of certain works undertaken by him as

President and in relation to certain monies of the Panchayat drawn by him, there was the usual scrutiny by the auditor who issued a surcharge

certificate. On the basis of the same, the Revenue Divisional Officer Erode, who is the appropriate statutory functionary issued the notice or

otherwise called a surcharge certificate under Exhibit A-5 dated 15/25th November, 1970 and called upon the appellant to account to the extent

of Rs. 4,517.86, which according to the Panchayat was the loss which it sustained by the appellant's misconduct in executing the work of building

entrusted to him. The appellant in his reply Exhibit A-8 admitted that he withdrew a sum of Rs. 7,415.86 from the Panchayat for the purpose of

completing the relative work, and he would not challenge the position that in respect of the said work, the final bill produced to the Panchayat in

relation to such work amounted to Rs. 2,898. As a matter of fact, the appellant apparently was unable to challenge this final bill as the Engineer of

Perundurai Panchayat Union, who was examined as R.W. 2 based his quantification and valuation of work on the basis of the measurement books

maintained by the appellant himself. On the basis of such measurement books, Exhibits B-2 and B-3, R.W. 2, who valued the work estimated the

value of the work done by the appellant at Rs. 2,898. To continue the narrative, the appellant in his reply Exhibit A-8, in reply to the specific notice

issued by the Revenue Divisional Officer under Exhibit B-6, would not challenge the quantification as above, but would take up the position that

when he stepped down from office, he handed over all the materials purchased for the construction of the building to his successor, and thus he has

accounted for the monies drawn by him, and he therefore, disclaimed any liability. The position taken by the Panchayat was that the appellant did

not only not account fully for the monies withdrawn by him from (sic) the Panchayat, but, the Panchayat sustained a loss due to the negligence and

misconduct of the appellant. They based their claim on the surcharge certificate, Exhibit A-5 issued by the Revenue Divisional Officer which in turn

was based on the auditor's report. The appellant also raised the plea that the claim is barred by time. The learned Judge considered two points:

1. Whether the petitioner is liable for the amount covered by the surcharge certificate?

2. Whether the surcharge certificate is invalid for any of the reasons set forth by the petitioner?

He dismissed the petition and hence the appeal.

7. Mr. Sivamani, learned Counsel for the appellant very hesitantly contended on the merits that the appellant was not liable to account. After

perusing Exhibits B-6 and A-8, the gist of which is incorporated in Exhibit A-5, he had no answer to the findings of fact rendered by the learned

District Judge. The appellant did withdraw a sum of Rs. 7,415.86. There is nothing in the evidence to show that besides merely handing over the

materials to his successor, he has fully, accounted for the public money withdrawn by him. Later, when the auditor took up the matter and when

the question came to Court, the Engineer of Perundurai Panchayat Union had to value the work done by the appellant. He evaluated the work at

Rs. 2,898. Nothing can be said against the said valuation. Regarding the balance of Rs. 4,517.86 the appellant's case is that he handed over all the

materials which he purchased towards the work from and out of the said balance to his successor. The learned District Judge has found that

Exhibit A-2 which is a copy of the communication sent by the appellant to the Divisional Panchayat Officer, Erode, does not contain any reference

to the handing over of such building materials to the successor of the appellant. We therefore agree with the Court below that the evidence let in is

insufficient to prove that the appellant has fully accounted for the public funds which he admittedly drew from the Panchayat.

8. The next question is whether the claim is in time. We have, in passing referred earlier to the material provisions of the Act of 1950 and the Act

1958 in relation to institution of surcharge proceedings against delinquent officers of persons in management of the Panchayat or its servants etc.

As already stated, the rules relating to powers of auditors in the matter of surcharge under the Tamil Nadu Panchayats Act, 1958 which were

framed in exercise of the powers conferred on the State Government by Clause (xvi-a) of Sub-section (2) of Section 178 of Act XXXV of 1958

came in to force on the 2nd September, 1964. Rule 1 thereof provides that the Commissioner of Panchayat Union Council or the Executive

Authority of a Panchayat shall submit all accounts to auditors appointed u/s 141 of the Act as required by the auditors. Rule 2 enumerates the

powers of the auditors. Ruled 3 and 5 touch upon the duty of the auditors. Under Rule 3, the auditors shall report to the concerned Panchayat or

Panchayat Union Council any material impropriety or irregularity which they may observe in the expenditure or in the recovery of monies due to the

public body. They should also report on any loss, waste or misapplication of monies or other property if such loss, waste or misapplication is a

direct consequence of his neglect or misconduct with the names of persons directly or indirectly responsible for such loss, waste or misapplication.

Rule 5 provides that any auditor empowered by the Government u/s 141 of the Act may disallow every item contrary to law and surcharge the

same on the person making or authorising the making of the illegal payments and may charge against any person responsible therefor, with the

amount of any deficiency, loss or unprofitable outlay incurred by the negligence or misconduct of that person or of any sum which ought to have

been, but is not brought to account by that person and shall in every such case certify the amount due from such person. The Explanation to Rule 5

reads thus:

It shall not be open to any person whose negligence or misconduct has caused or contributed to any such deficiency or loss, to contend that

notwithstanding his negligence or misconduct, the deficiency or loss would not have occurred but for the negligence or misconduct of some other

person.

The next rule says that any person who is aggrieved by disallowance, surcharge or charge made, could apply to the Principal Civil Court of

Original Jurisdiction to set aside such disallowance, surcharge, etc. and attack the surcharge certificate. The aggrieved person has also an

alternative remedy. Instead of applying to the Principal Civil Court of Original Jurisdiction and taking their orders thereon, Sub clause (2) of Rule 6

says that any decision of the Principal Civil Court of Original Jurisdiction under Clause 6 (1) (a) is appealable and such appeal shall lie to the High

Court. The sole respondent in all such proceedings shall be the auditor. It is in this context that the Revenue Divisional Officer alone figured as the

respondent in the trial Court.

9. We have already traced the history of these surcharge rules. Though the rule-making power enables the framing of such Rules under the Act of

1950, for some reason it was removed from the statute book in 1957. Thereafter, it reappeared again only in 1964, though in the interregnum the

new Act XXXV of 1958 was passed. Mr. Sivamani contends that the claim is barred by limitation in view of Sections 173 and 165 of Act XXXV

of 1958. His argument is twofold. Firstly, he would say that it is the President of the Panchayat who undertook the work, and Section 173 is a

special provision which applies to such a situation and the action not having been initiated within three years from the date when the cause of action

arose, the claim is barred by limitation. Secondly, relying upon the general provision, namely Section 165 of Act XXXV of 1958, the learned

Counsel contends that the claim not having been made within three years from the date when it first ought to have been made in a manner known to

law, the demand in the shape of a surcharge certificate is unsustainable. Of course, on the merits he contended rather hesitantly that the appellant is

not liable. Learned Government Pleader, on the other hand would say that the Surcharge Rules framed u/s 178 (2) (xvi-a) of Act XXXV of 1958

operated independently without reference to Sections 173 and 165 and thus viewed, the issue of the surcharge certificate under Exhibit A-5 and

the prior notice Exhibit P-6 calling upon the petitioner to explain were all done under statutory authority, and that therefore the appellant is bound

by it and he cannot claim that there was no cause of action at all to investigate and much less discover the misapplication of public funds which is

traceable to covert acts on (he part of the appellant.

10. No doubt, Sections 173 and 175 of Act XXXV of 1958 apparently do overlap in the matter of the period of limitation for recovery of monies

which are the subject-matter of misapplication, loss or waste due to some overt or covert act on the part of any person connected with the

Panchayat. Whilst Section 173 deals with the liability of the President, the Executive Authority and the members of the Panchayat for such waste

or misapplication of panchayat properties, Section 165 is general in scope and deals with an action against any person from whom the Panchayat

could recover monies due to it. Of course, Section 165 also speaks of the period within which a prosecution could also be laid against a person in

connection with violation of any of the Rules by-laws, regulations, etc. or non-payment of any tax, or any sum due to the Panchayat or Panchayat

Union Council. We are unable to appreciate the contention of the learned Counsel for the appellant that in a case where proceedings are initiated

under a special and an express procedure provided for in the very same statute, the general provisions referred to in Sections 173 and 165, though

the former is somewhat special in nature, would exclude the operation of such a special procedure. It cannot be gainsaid that the rule-making

power u/s 178 includes the framing of rules in connection with the powers of the auditors to surcharge items, etc. The auditors referred to in

Section 178 and in the other provisions of the Act have a special meaning since Section 141 of the Act refers to the appointment of such auditors.

Section 141 provides;

The Government shall appoint auditors of the accounts of the receipts and expenditure of the funds of the Panchayat Union Council and of the

panchayat. Such auditors shall be deemed to be "public servants" within the meaning of Section 21 of the Indian Penal Code.

Therefore, it follows that when Section 178 (2) (xvi-a) contemplated the making of rules in connection with the powers of auditors to disallow and

surcharge items and for recovery of sums so disallowed or surcharged, then it cannot be said that such amounts so disallowed or surcharged by the

auditors would be amounts which have to be accounted for by the named officer u/s 173 or by any other person u/s 165 of the Act. The special

excludes the general, is a well-known principle.

11. Natarajan, J., in an elaborate judgment while considering a similar situation held in A. Sahadevan Vs. M. Muthuraj in his capacity as the

Auditor of the Kilchettipattu Panchayat Board, that no time-limit is prescribed under the Act for audit proceedings being taken or completed, and it

is therefore, clear that Section 173 has no application to surcharge proceedings and recovery of amounts thereunder, and consequently, the period

of limitation prescribed u/s 173 cannot have application to audit proceedings. We are not excerpting any passage from this judgment since such

truncated references would to a considerable extent, whittle down the force of the opinion of the learned Judge who decided the matter. We

entirely approve of the ratio in this judgment. Varadarajan, J., also had to consider a similar matter in two unreported judgments--one in

Periaswami Gounder v. The Divisional Officer, Erode C.M.A. No. 504 of 1972 and the other in Ramaswami Gounder v. The Revenue Divisional

Officer, Dharmapuri C.M.A. No. 278 of 1973 both of which were brought to our notice and the learned Judge took contrary views. In the former,

he held that as there is a specific provision in Rule 6 as regards time in the

matter of taking proceedings against persons surcharged, Section 165

would not apply and that there is no period of limitation which could be invoked in the matter of enforcement and recovery of the amounts

mentioned in the surcharge proceedings. But, in the latter judgment of his which is also unreported and which is apparently relied upon by Mr.

Sivamani, the learned Judge said that the claim is barred by limitation and proceedings under surcharge are governed by the Rules in Section 165

of the Act. While we approve of the judgment of Varadarajan, J., in C.M.A. No. 504 of 1972, we dissent from his judgment in C.M.A. No. 278

of 1973.

12. That this is the correct view has been held as early as 1935 by Venkatasubba Rao, J., in Kondho Rayagaru Vs. The District Collector of

Ganjam, . The facts therein could be summarised thus. A bill collector collected certain amounts of house tax in Union Board and did not bring

them into account. The audit reports adverted to it but the then President of the Local Board did not have the defect remedied. Long thereafter in

1929 when the collections relating to 1925 were audited, the auditors issued a surcharge certificate under the Surcharge Rules then in existence

under the Madras Local Boards Act XIV of 1920. They surcharged the President of the Board with the amount of the loss. The President

appealed under Rule 6 of the Surcharge Rules under the Local Boards Act to have the order of surcharge set aside and pleaded that action having

been taken beyond three years from the date when the cause of action arose, it was barred. Venkatasubba Rao, J., after considering the Indian

and English Law on the question, held Section 227 of the Madras Local Boards Act is in pari materia with Section 173 of the Tamil Nadu

Panchayats Act, 1958, and the Surcharge Rules framed under the Local Boards Act are almost similar to the Rules framed under the Tamil Nadu

Act of 1958 u/s 178 (2), thereof thus:

There was no inconsistency between Section 227 of the Madras Local Boards Act and the Surcharge Rules, and that Rule 5 was not ultra vires of

the local Government, and there being no period of limitation prescribed by the Rules for issuing a certificate of surcharge, the certificate issued by

the auditor was not vitiated.

13. The next contention of Mr. Sivamani is that the President being the person

who has been surcharged, and he being specially included as the person against whom suits could be filed for compensation, or for misapplication of funds u/s 173, it is that section alone which should be invoked for the purpose of furthering the cause if any of the Panchayat. Here again, there is a fallacy. The special provision relating to recovery of money misapplied or which is the subject-matter of malfeasance or misfeasance by persons like Presidents, Executive Authority, and Members depends upon the fact that there is a cause of action against them which was available to the Panchayat and which could be availed of by them for commencement of the action. In fact, Section 173(2) says that every such suit shall be commenced within three years after the date on which the cause of action arose. To a similar effect is the provision u/s 165 which says that a suit to recover dues contemplated in that section could be instituted within six years from the date on which a suit might first have been instituted. The accent therefore, is on the cause of action which is the main foundation for action. Let us see as to what is the date of the cause of action in cases where misapplication of public funds is discovered through the process of the surcharge proceedings. It may be that the administrators of the Panchayats or Councils may be indulgent in not forwarding the accounts to the statutory auditors for audit for a considerable length of time, but that cannot be taken advantage of by the, delinquent who misapplied funds. As pointed out by Venkatasubba Rao, J., in *Kondho Rayagaru Vs. The District Collector of Ganjam*, , it is for the Legislature to enact a provision compelling the administrators of Panchayats to be prompt in sending the accounts to the auditors to enable them to find whether a disallowance or discharge of amounts handled by persons in management should be made or not. The appellant as President of the Panchayat cannot, of course, rely upon and even if the appellant contends that the period of three years in Section 173 and a period of six years in Section 165 from the date of the cause of action is the guideline for action, we have to find out what is the date of the cause of action in the special and unique proceedings with which we are concerned. It is not the date when the funds have been misapplied, because no one can say as to on what date it has been misapplied or whether it has been misapplied at all until the auditor gives the certificate. All monies

handled by public men in public authority are generally the subject-matter of audit, and it is only at the end of such scrutiny by the auditor that a discovery can be made about any misapplication or wrongful application of public funds. Till then, it would be idle to contemplate that the funds of a Panchayat or a Union Council have been misapplied or misappropriated. Human as they are, persons in management would not admit that they have misapplied the funds or they are guilty of malfeasance or misfeasance. Some one over their head must tell them that they have misapplied and they have committed acts of malfeasance and that someone should have the requisite power under the statute to scrutinise their acts and make reports on them. Therefore, the cause of action, in situations like the one with which we are confronted with, can only arise on the date when the auditor completes the reports and issues the surcharge certificate. It is common ground in this case that action has been laid well within a period of 3 years from the date of the surcharge certificate issued by the auditor. Therefore, viewed in this perspective also, we have no hold that the claim is not barred by time.

14. C.M.A. No. 465 of 1974 is also dismissed, but there will be no order as to costs.