

(2020) 12 KL CK 0047

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 21200 Of 2020 (Y)

Jincy Aji

APPELLANT

Vs

State Of Kerala And Ors

RESPONDENT

Date of Decision : 02-12-2020

Acts Referred:

Kerala Panchayat Raj Act, 1994 — Section 166, 169, 170, 254
Kerala Panchayat Raj (Execution Of Public Works) Rules, 1997 — Rule 4, 6, 7, 8
Constitution Of India, 1950 — Article 51A(j)

Citation : (2020) 12 KL CK 0047

Hon'ble Judges : P.V. Asha, J

Bench : Single Bench

Advocate : Haris Beeran, O.A. Nuriya, Ashitha Ria Merin, Blaze K. Jose, Judy Jose, Urmila Zacharia, K.V. Manoj Kumar

Final Decision : Disposed Of

Judgement

1. Petitioner is the President of Kizhakkambalam Grama Panchayath which is governed by an association viz. Twenty-20, which is not affiliated to any political party. The 6th respondent who is a PWD Contractor had been undertaking the work of urgent patch repairs on the existing PWD roads at different stretches within the area of the Panchayath. It is stated that Kizhakkambalam Grama Panchayath as per Ext.P2 resolution dated 28.11.2019 passed a resolution to make development projects in the Panchayath with Public Private Participation (PPP) model and to seek financial assistance of Twenty-20 Association for the same and also to seek support of people of the locality. The Twenty-20 Association as well as the people of the locality surrendered their land and provided funds in support of the decision taken by the Panchayath. The Vice President of the Panchayat as per Ext.P3 letter addressed the Executive Engineer -the 2nd respondent

requesting to permit their participation and complete the work of the road in PPP model, so that there will not be any additional expenditure for the PWD. It is stated that they had addressed the Assistant Engineer as well as the Assistant Executive Engineer offering their cooperation to develop the road. It is stated that as per Ext.P5 letter dated 30.04.2020 the Assistant Executive Engineer had addressed the Executive Engineer informing that the repair of the roads Chelakkulam-Pookkatupadi from Ch.2/600 to 5/600, urgent repairs to Thamarachal-Malayidamthuruth road ch.1/000 to 2/500, SLTF 2019-20, urgent patch repairs to Thamarachal " Malayidam thuruth road ch.2/550 to 3/500 and patch repairs to Chelakkulam- Pukkattupady ch.5/600 to 7/400 are included in the work for making the road motorable out of PWD funds to the tune of Rs.10 lakhs. Stating that several potholes had been developed in the road and that it would not be possible to complete the work of the road with the available funds allotted by PWD, he informed that the President of the Kizhakkambalam Grama Panchayat has come forward to undertake the work of road in BM and BC standard in accordance with PWD specification using the funds of Twenty- 20. He requested for permission to complete the patch work with the PWD fund and thereafter to undertake the work of enhancing the standard of the road. But thereafter as per Ext.P7 letter dated 19.05.2020, the Asst.Engineer informed the President of the Panchayat that he had taken up the matter with Assistant Executive Engineer, as per his letter dated 11.03.2020 and therefore the works on the road which are not covered by the PWD schedule, need be undertaken only after sanction is obtained from PWD. It is stated that the work was thereupon stopped and petitioner informed the Chief Engineer about the same on 26.05.2020 that the work had been progressing so as to complete the same before the monsoon starts; but it was kept pending awaiting sanction from PWD. Thereafter the Assistant Executive Engineer as per Ext.P9 letter dated 08.06.2020 directed the Contractor that he shall not undertake any work which is not covered by the agreement executed by him except after getting permission from PWD. Pointing out that the work was almost completed and Government would not incur any additional expenditure for the additional work on the road and that the same was being constructed for the public good and stating that the work had to be stopped at a time when the tarring work alone is left, the petitioner has

approached this Court seeking a direction to respondents 2 to 4 to grant them permission to tar the PWD roads mentioned above, as recommended by

the 3rd respondent and to permit them to raise the standard of the road to international level. Relying on Ext.P10 interim order in WP(C)

No.16137/2020 by which additional work on another road was permitted by this court, the petitioner submits that the work already undertaken by

them, is liable to be permitted to be completed at least before starting of the next rainy season. It is stated that the said Panchayath has undertaken

several other road works all over the Panchayth and enhanced the standard of the same with minimum cost. Producing Ext.P11 agreement, along with

I.A.No.01/2020, executed by another contractor based on which this court had allowed widening of the road as per Ext.P10 judgment, the petitioner

stated that the estimated cost by PWD for improvement of road in BM &BC standard for a stretch of 4 kms from Chainage 0/000 to 0/400 in

Chembarakki-Pookattupadi road was Rs.2.5 crores whereas pursuant to Ext.P5 recommendation of Assistant Executive Engineer and the Panchayath

resolutions, widening of the roads, drainage work, shifting of electric post, BM-BC tarring, etc were done under the PPP model for a total amount of

Rs.1,46,00,000/-, when almost 70% work was over. . It was stated that the total expense would come to only around Rs.3,81,92,890/- and when

almost 70% of the works were completed, the letter for stoppage of works was issued by the 4th respondent.

2. The Ex.Engineer has filed a statement on behalf of respondents 1 and 2, on 09.11.2020, stating that the Writ Petition at the instance of the petitioner

is not maintainable, as she does not have the locus standi, that too with the Grama Panchayat, of which she is the President as a respondent. It is

stated that Ext.P9 letter of the Asst.Executive Engineer directing to stop the work, was issued strictly in accordance with rules. It was stated that

Kizhakkambalam Grama Panchayath in effect wants to take over the PWD road which is not covered by any of the provisions governed by any of

the Acts or rules. It was stated that a Village Panchayth is not authorized to take over or to stake any claim over a State High Way or a Major

District Road which are under the jurisdiction of PWD; under the Kerala Panchayat Raj Act, the Village Panchayat can have jurisdiction only over

those roads which are specifically notified as of the Village Panchayats; the principle of distribution of powers with the Local Self Government and the

State Government does not authorise a Grama Panchayat to take over or stake claim over a road which form part of PWD. It is stated that any work

on the PWD road can be done only with the permission of PWD. It is also stated that there is no provision in the Kerala Panchayat Raj Act or Rules,

for executing any work in PPP model; the Grama Panchayat has no authority to get the road widened obtaining funds from Twenty-20 or by PPP and

the same is without the sanction of law and contrary to the provisions in the Panchayat Raj Act and petitioner cannot insist for permission for the

same from PWD. It is further stated that as per Clause 2600 of PWD Manual, maintenance of the State High way and that Major District Roads is

the responsibility of the PWD. However, it is stated that as per clause 1801.1.2 of the PWD manual, PWD can accept funds as deposit for the

purpose of construction of roads. It is stated that on receipt of the request from the 5th respondent, the 2nd respondent had taken up the matter with

the Chief Engineer (Roads) and the Chief Engineer was directed by the 2nd respondent to prepare an estimate for upgrading the roads as BM and BC

roads, as per IRC Standards, based on which Annexure R2(c) estimate was prepared in accordance with IRC specifications and DSR 2016 cost

index.

It is stated that in order to ensure the standards, the ancillary works like construction of culverts, drains on either sides, covering slabs, etc. are also to

be executed in addition to widening of existing road from 4.6mts to 5.5 meter. According to the respondents, there was no recommendation by any

PWD official on the request of the petitioner; it was only forwarded to the higher officials. According to them, in case the Panchayat wants to

upgrade the road to BM and BC standard, Panchayat can deposit the amount with PWD specifically for that purpose and PWD would execute the

same ensuring the quality of work, in which Panchayat can also be involved. However it is stated that the claim of the Panchayat for undertaking the

work cannot be allowed as it would be by usurping the powers of PWD. It was stated that the better agency for ensuring the quality of the road is

PWD itself, which has the technical expertise. It is further stated that construction of a BM and BC road as per IRC standard involves shifting of

utilities/providing provision for utilities both underneath on the road and construction involves further technical issues pertaining to its design, which the

Panchayat would not be able to handle. According to the respondents, if the petitioner or the Panchayat are allowed to construct the road with the help of their funding organisation the same would have serious consequences.

3. The learned Government Pleader filed a statement stating that the work covered by Ext.P10 judgment was only for widening of the road. In the present case it is stated that a layer of 10 mm width and 15 cm thickness has to be provided in the entire area for profile correction which would require Rs.26,48,051/- per kilometre. Furnishing the rates for different works, it is stated that many of the items required for upgrading the road into IRC standard are not furnished by the petitioner.

4. The 5th respondent Panchayat has filed a counter affidavit explaining the resolution taken by the Panchayat on 23.01.2017 for utilising the private fund for the development of infrastructure facility in the Panchayat, in public interest. The 5th respondent Panchayat has resolved that all by-roads and main roads should be maintained with high quality work with public private participation as per Ext.R5(b) resolution dt.12.03.2017. Thereafter Annex.R5(c) resolution was passed on 25.06.2019 to the effect that all roads, ponds, wells, etc. should be included in the asset register of the Panchayat and to keep the details regarding the participation/utilisation of the funds in the asset register. It is stated that the Panchayat has already completed several works of several roads in the Panchayat in BM and BC specification with public private participation. The Panchayat committee has also resolved to utilise private and public funds for maintaining good quality of roads in the Panchayat as per Annex.R5(d) resolution. It is stated that the 2nd respondent granted only a very little fund for conducting urgent repairs for filling pot holes on the Chelakulam-Pookattupady road. It is stated that if the funds are utilised only for repair works, it would not be possible to maintain motorable roads in good condition and the Panchayat had taken a decision to see that modification work shall have better quality for long duration.

5. According to the petitioner, the work is undertaken in a higher standard but at a lower rate compared to the PWD rates. This Court has passed an interim order on 17.11.2020 directing the Ex.Engineer to inspect the premises and furnish a report as to the nature of the work that has been completed and whether the tarring alone would be required for completion of the

work.

6. The learned Government Pleader has produced the said report along with memo dt.25.11.2020. In the letter addressed to the Advocate General the

Ex.Engineer has stated that PWD had arranged 5 works; the contractor started the widening of all the roads which are not included in the

schedule/without prior sanction from PWD. It is stated that any item other than those scheduled can be executed only after getting NOC from

concerned authority of PWD. Regarding the present stage of work it is stated that in respect of item No.1 'flood damage urgent patch repairs to

Chelakkulam-Pookkattupadi road 2/600 to 5/600', 'the nature of PWD work' is stated as 'pot hole filling with 20mm close graded patch', present

condition is reported as 'widening works are completed which is not included in the agreement schedule'; time required for developing the road as per

IRC std.' is stated as '6 months'. Against item 2 -SLTF 2019-20 Thamarachal â?" Malayidamthuruth road ch.2/550 to 3/500, 'nature of PWD work' is

stated as: 'pothole filling with 20mm close graded patch'; present condition stated as: 'work not started' and the 'time required' is stated as : '6 months'.

Item 3 - 'SLTF 2019-20 Thamarachal-Malayidamthuruth road ch.1/000 to 2/500'; nature of PWD work : 'pothole filling with 20 mm close graded

patch; and present condition is stated as: 'widening works are completed partially which is not included in the agreement schedule' and time required

for completion of work is stated as '6 months'. Item 4: Flood damage 2019-20 urgent patch repairs to Chelakkulam-Pukkattupady Road 5/600 to 7/400;

nature of PWD work is stated as 'pothole filling with 20 mm close graded patch'; present condition is stated as 'overlay work completed'. Against

remarks it is shown as 'drain work to be arranged'. Item 5 - flood damage 2019-20 providing urgent patch repairs at Muruvilangu-Karukulam-

Mankuzhi road from ch 0/200 to 0/500; nature of PWD work is shown as 'drain work, GSB and WMM rising with 20 mm close graded work' and

present condition is stated as 'drain work and GSB & WMM rising completed' and time required is stated as '2 weeks'. As against remarks it is stated

as 'tarring to be done'. As against item 1-3 the remark of the Executive Engineer is: 'To develop the road as per IRC standards with BM & BC, it is

necessary to provide sub-base with WMM of 15 cm thickness over the entire stretch. Also it is very essential to provide drainage facilities, roads

safety items, reconstructions of culvert etc.'

7. The petitioner along with the Panchayat as well as the contractor wants to complete the work with Public Private Participation. At the same it is

stoutly opposed by the Government.

8. Heard Sri.Harris Beeran, the learned counsel for the petitioner, Sri.Manoj Kumar, learned Senior Government Pleader, Sri.Jose Kannanthanam,

learned Senior Counsel for the Panchayat and Sri.Blaze K.Jose, learned counsel for the contractor.

9. Sri.Manoj Kumar, the learned Senior Government Pleader, vehemently argued that the Writ Petition at the instance of the petitioner, who is the

President of the Panchayat that too with the Panchayath as a respondent does not have any locus standi to file this Writ Petition and that the

Panchayat can undertake only those works provided in the Panchayath Raj Act and the rules framed thereunder and that too in the manner prescribed

in those rules; petitioner cannot have any right to undertake any work on a PWD road going by the provisions in Kerala Panchayat Raj (Execution of

Public Works) Rules, 1997, the Kerala Panchayat Raj Act and PWD Manual. It was submitted that if the Panchayath or even the petitioner deposits

the amount with the PWD, the work would be executed in accordance with IRC specifications.

10. In view of contentions raised by the learned Government Pleader, it is necessary to have a look at the relevant provisions in the Kerala Panchayat

Raj (Execution of Public Works) Rules, 1997 (hereinafter referred to as 'the Rules 1997')

2. Definitions:

a) Act means the Kerala Panchayath Raj Act 1994(13 of 1994). xxxx

(c) Public work means a public work liable to be executed under the Act. Procedure and execution of public works:

xxxxxx

(3) Subject to sub-rule (1) of Rule 6, the Panchayat shall decide how to execute each public work; whether on contract basis, or directly by the

Panchayat or through the beneficiary committee and that shall be made clear while administrative sanction is given.

(4) The Panchayat may decide whether a public work may be executed through contractors if such public works involves technicality, machinery to

be used and required the supervision of experts or directly by the Panchayat if it can be executed urgently or profitably by using local materials or through beneficiary committee if it can be executed by the participation of beneficiary committee.

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11. Rule 4 provides for the authority competent to give administrative sanction. Relevant portions of Rule 6, 7 and 8 read as follows:

6: (1) No panchayat shall commence public works unless allotment of fund has been made in the budget and administrative sanction is accorded by the competent authority under Rule 4 and a detailed plan and estimate is prepared and technical sanction is accorded under Rule 7.

7. Technical sanction for every plan and estimate relating to any public works which shall be obtained from an Assistant Engineer, Assistant Executive

Engineer or Executive Engineer or Superintending Engineer, who is in charge of the public works of the Panchayat subject to financial powers

specified on each grade of Engineer by the Government by notification from time to time.

8. Invitation of tenders: (1) Upon orders of the President, Secretary or any other officer authorized by the Panchayat for execution of public works,

shall invite tenders for execution of public work if the Panchayat has decided to execute it through a contractor.

12. As pointed out by the learned Government Pleader, the public works under the Panchayat are to be got done after inviting tenders. The contention

of the learned Government Pleader is that the 6th respondent contractor had been engaged for undertaking the additional work without inviting

tenders, as provided in Rule 8 and the work was being done without including it in the budget and without administrative sanction, which are not

permitted under the Rules.

13. Though the learned Senior Counsel Sri.Kannanthanam argued that the KPR Execution of Public Works Rule, 1997 do not relate to any of such

work as the same is issued under Section 254 of the Panchayat Raj Act, as rightly pointed out by Sri.Manoj Kumar, the learned Government Pleader

Section 254 is the enabling provision to make rules; the functions of the Village Panchayats are in respect of matters enumerated in the 3rd schedule

to the Panchayat Raj Act as stated in Section 166 of the Act. Public works come

under Clause XI of the 3rd schedule. Sl.no.1 under it is:

Construction and maintenance of village roads within Village Panchayat.

14. As pointed out by the learned Government Pleader, under Section 169 of the Panchayat Raj Act, only those public roads other than those

classified as National Highway, State Highway or major district road are vested in a Village Panchayat. The road in question is stated to be a major

district road, as pointed out by the learned Government Pleader, which nobody disputed. Only village roads are vested in a Village Panchayat. The

duty conferred on the Village Panchayat under Section 170 of the Act is to maintain properly the roads vested in the Village Panchayat.

15. All the learned counsel except the learned Government Pleader, relied on Ext.P10 judgment and pointed out that the work is being done for the

public good and only the tarring work is to be completed and when the work was permitted in Ext.P10 judgment the work has to be permitted to be

completed.

16. On examination of the relevant rules it is seen that the road in question is not vested in the Panchayat and any work if undertaken by the

Panchayat is to be by inviting tenders and they cannot select their own person to do the work. It is also relevant that the petitioner as well as anybody

in the Panchayat or otherwise are supposed to act in accordance with rules.

17. It is also seen from Ext.P10 judgment that the Writ Petition was filed by the contractor in that case and he had sought for police protection when

objections were raised by one Panchayat. However it is seen that this court directed to permit widening of the road.

18. It is also seen that there is dispute by PWD regarding the nature of work/ procedure of work for enhancing the standard of Road to BM&BC, the

ancillary works to be undertaken for it, rate for the same, etc. It cannot also be disputed that the Panchayath or anybody else does not have any

authority to undertake work on the PWD Road or any road which is not vested in it.

19. Be that as it may, the fact remains that considerable work is undertaken on the 5 roads on which patch repair works were awarded by PWD, on

the basis of PPP or Twenty-20 funds. The work already done cannot be directed to be undone. After all the beneficiaries or victims of good/bad roads

are the public at large. According to the petitioner, the Panchayath as well as the

Contractor, the only work which remains to be done is tarring work and they would finish the work within 2 weeks. Though according to the Executive Engineer, even the work awarded to the contractor would require 6 months for completion, the report would also show that work not covered by agreement are already undertaken, though not completed.

20. Therefore, without going into the authority of the Panchayat on decentralisation or the roads which are vested in it or the requirement in the Rules 1997 or the specifications for BM&MC or IRC standards, I am of the view that the work so far done has to be protected. Now that work came to a stand still since 26.05.2020, any further delay in tarring the road, will result in not only loss to the public to have the benefit of a motorable road but also in waste of money and efforts taken for the same, rightly or wrongly. Everybody, including the one who constructs the motorable roads, is subject to rule of law, even when it is for the public good. For the time being, it can be taken as a step towards performing the fundamental duty of each of those in the Panchayat to individually and collectively, strive towards excellence as provided in Article 51A(j) of the Constitution of India in order to rise to higher levels of endeavor and achievement.

Therefore respondents 1 to 4 shall see that the tarring work is allowed to be done at the earliest under the supervision of respondents 2 to 4 after withdrawing the stop memo Ext.P9. The tarring work shall be completed within a period of 2 weeks on granting permission.

The writ petition is disposed of accordingly.