

(2009) 09 KL CK 0033

In the High Court Of Kerala

Case No : Writ Petition (C) No. 8863 of 2007

Kalatharachira Padasekharam

APPELLANT

Vs

Chellanam Grama Panchayat

RESPONDENT

Date of Decision : 16-09-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Irrigation and Water Conservation Act, 2003 — Section 13, 14
Kerala Panchayat Raj Act, 1994 — Section 14(1), 14(2), 218, 218(1), 82

Citation : (2009) 4 KLT 336

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : Govind K. Bharathan, K.P. Sarvothaman, Prabin Babu, C.P. Kunjhlkannan and S.K. Madhu, for the Appellant; N.N. Sugunapalan Dinesh R. Shenoy, Varghese C. Kuriakose, Praveen K. Joy, S. Sujin, Dilip Mohan and Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Antony Dominic, J.—Petitioner is Kalatharachira Padasekharam.

2. In this Writ Petition, prayers sought by the petitioner are to declare that the 1st respondent Panchayat has no manner of authority over the sluice at the Kalatharachira Kochuchira Bund and that the said Panchayat has no authority to auction the right of prawn farming/fishing at the said minor irrigation sluice by virtue of the provision contained in Section 218 of the Kerala Panchayat Raj Act, 1994 (hereinafter referred to as Act for short). A further direction to the 1st respondent to refrain itself from taking any steps to auction or grant the right of prawn filtration, farming and fishing at the sluice situated in the Kalatharachira Kochuchira Bund and to refrain from demanding any amounts from the petitioner or its members towards prawn farming/fishing is also sought for.

3. Petitioner is a registered society with a membership of 282 small farmers together owning about 200 acres of paddy field consisting of the padasekharam.

Petitioner states that inspite of the fact that the members of the padasekharam alone have ownership over the aforesaid 200 acres, the Panchayat is attempting to auction the rights of prawn farming/fishing in the padasekharam including at the sluice and that the Panchayat has no manner of right to do the same. According to the petitioner, said unauthorised exercise of power by the Panchayat is on the basis that the water courses, springs, reservoirs etc., have been vested in the Village Panchayat in terms of the provisions contained in Section 218 of the Kerala Panchayat Raj Act. Thus, the basic premise on which the petitioner has filed this petition is that the entire area consisting of the padasekharam belongs to its members and that the Panchayat has right whatsoever, over the said area and also at the sluice, which is a work of irrigation, excluded from vesting in view of the proviso to Section 218 of the Act.

4. On the other hand, according to the Panchayat, it is not trespassing into the areas of the padasekharam owned by the petitioner or its members. According to the Panchayat, a substantial and important portion of the padasekharam is puramboke land vested in it and that the amount collected by the Panchayat is for farming out the right for prawn farming/fishing in the aforesaid area, which is vested in it. In fact, when this ownership claim was raised by the Panchayat, this Court directed the additional 5th respondent to inspect the site in question with the assistance of Taluk Surveyor and Village staff, verify the records and file a report. Accordingly, affidavit dated 7th February, 2008 has been filed, para.3 of which, being relevant, reads as under:

It is submitted that on the basis of the direction of this Hon'ble Court issued on 7.1.2008 this respondent with the help of Taluk Surveyor and Palluruthy Village staff, inspected the site in question and verified the records. As per the village records the Panchayat owned an extent of 15.97.500 acres of land in Kalatharachira Padasekharam as Puramboke Thodu. According to the Panchayath Raj Act the Puramboke Thodu is vested with the Panchayath. It is true that the Padasekharam consist of several land owners and the said Padasekharam consist of about 197 acres of paddy fields. These fields are situated on either side of a watercourse known as the Kalathra Chal (Thodu). The said Thodu and the Thodu puramboke are vested with the Panchayath. Regarding the sluice there are 2 sluices in Kalatharachira padasekharam. The sluice on the southern side that is near to the Indira Gandhi road is completely vested with the Panchayath. Eventhough a small portion of the sluice situated on the north eastern side belongs in a Patta land, the major portion of the same is situated in Puramboke which is vested with the Panchayath. In this connection a report from the Village Officer is also produced herewith and marked as Ext.R5(a) and which will show that 15.97.50 acres of land in the Padasekharam is Puramboke land in different survey numbers and the same belongs to Panchayath.

5. Ext.R5(a) mentioned in the affidavit is a report of the Village Officer addressed to the Additional Tahsildar, Cochin, containing the details of the survey numbers of the puramboke land, having an area of 15.97.500 acres, in which the thodu is

situated. In addition to the above, reference is also made to the existence of roads over about 1.5 acres of land, which is stated to be maintained by the Panchayat. Thus, essentially, the area, over which ownership is claimed by the Panchayat, is the area covered by natural water course, in which the sluice maintained by the Minor Irrigation Department is constructed, and includes the area covered by pathways and roads as well. It is in respect of the aforesaid area, as stated in paragraph 5 of the Writ Petition itself, the Panchayat has been farming out the right to do prawn farming/fishing at the rate fixed on negotiation with the petitioner, and if the petitioner is unwilling, by auctioning the right.

6. In this context, it should be clarified that according to the petitioner, the entire prawn farming/fishing is done by them within the padasekharam area, and that they are not using any portion of the water course for this purpose except that yield is collected at the sluice. Although, this factual statement made by the petitioner is disputed by the Panchayat, I am proceeding on the basis that the petitioner is confining its activities of prawn farming in the padasekharam, and that the prawn yield alone is collected at the sluice maintained by the Minor Irrigation Department. The question is, in a factual situation as stated by the petitioner, whether the Panchayat can claim any right to realise any amount from the petitioner or its members.

7. The learned Counsel for the petitioner has made reference to Section 218(1) of the Act and its proviso, which reads as under:

218. Vesting of water course, springs, reservoirs, etc., in Village Panchayats.

(1) Notwithstanding anything contained in the Kerala Land Conservancy Act, 1957 (8 of 1958) or in any other law for the time being in force, all public water courses (other than rivers passing through more areas, than the panchayat area which the Government may, by notification in the gazette, specify), the beds and banks of rivers, streams, irrigation and drainage channels, canals, lakes, back waters and water courses and all standing and flowing water, springs, reservoirs, tanks, cisterns, fountains, wells, kappus, chals, stand pipes and other water Works including those used by the public to such an extent as to give a prescriptive right to their use whether existing at the commencement of this Act or afterwards made, laid or erected and whether made, laid or erected at the cost of the panchayat or otherwise, and also any adjacent land, not being private property, appertaining thereto shall stand transferred to, and vest absolutely in the Village Panchayat. Provided that nothing contained in this Sub-section shall apply to any work which is, or is connected with, a work of irrigation or to any adjacent land appertaining to any such work.

A reading of the proviso to Section 218(1) and its proviso, therefore, shows that the vesting as contemplated under the Section shall not apply to any work which is, or is connected with, a work of irrigation or to any adjacent land appertaining to any such work.

8. In the Division Bench judgment of this Court in Kodamthuruth Panchayat v.

Vasu Pillai 1989(1) KLT 21, referring to the provisions contained in Section 82 of the Kerala Panchayat Act and the Travancore Cochin Irrigation Act, 1956, it has been held that the irrigation works include sluices also. On that basis the Division Bench has held as follows:

3. The learned Counsel for the appellant contended that the Panchayat has not in any way meddled with the irrigation work, namely, the five sluices but it has only exercised its right of auctioning the fishing rights in the* waters that flow through the sluices. But the proviso to Sub-section (1) of Section 82 makes it clear that it is not only the irrigation work proper that does not vest in the Panchayat but also any work connected with such irrigation work and also any adjacent land appertaining to any such work also does not vest in the Panchayat. Thus there cannot be any doubt that the land or area reasonably close to the sluices which are irrigation works does not stand vested in the Panchayat. It is not just the point where the sluices terminate but the land or area appertaining or adjacent to the area also does not vest in the Panchayat. The object of this provision is clearly to see that the irrigation work should not suffer on account of some other agency operating near about it which may injuriously affect the irrigation work. It is precisely for this reason that the State Government took care to introduce the proviso to Sub-section (1) of Section 82 to protect the irrigation works. The irrigation work can be protected not only by directing not vesting of the irrigation work in the Panchayat but also by not vesting the adjacent or appertaining area thereto in the Panchayat. We have therefore no hesitation in taking the view that the learned single Judge has rightly taken the view that the land adjacent to the sluices does not stand vested in the Panchayat and that therefore the Panchayat has no right to auction the fishing rights adjacent to the sluices. As the declaration of law is consistent with the good object sought to be achieved by the proviso to Sub-section (1) of Section 82 of the Panchayats Act, the question of interfering with the decision of the learned single Judge does not arise. We would like to make it clear that the declaration of law so made in this case to the effect that the Panchayat does not have the right to auction the fishing rights near the sluices does not have the effect of declaring that the petitioners in the Writ Petition have such a right of fishing. No such declaration has been made by the learned single Judge. As the area in question does not stand vested in the Panchayat it is for State Government to exercise its control and regulate the activity in the area adjacent thereto for the purpose of protecting the irrigation work in a very satisfactory manner.

9. In almost identical factual situation; following the aforesaid judgment of the Division Bench, a learned Single Judge of this Court disposed of Original Petition. No. 7801 of 2001 by judgment dated 18.07.2002, the relevant portion of which reads as under:

Thus the proviso indicates that this will not apply to any work which is, or is connected with, a work of irrigation or to any adjacent land appertaining to any such work. A Division Bench of this Court in decision reported in Kodamthuruth

Panchayath v. Vasu Pillai 1989 (1) KLT 21 had occasion to decide almost an identical issue. It has been held that the expression "irrigation work", with reference to the Travancore-Cochin Irrigation Act, 1956, includes maintenance of sluices. Taking note of the expression as arising in the Panchayath Act, the vesting contemplated according to the Division Bench, was not to take place in respect of any work which is connected with a work of irrigation or of any adjacent land appertaining to any such work. Thus it was held that though the Panchayat may be able to claim that the thodu had been vested in the Panchayath, the Court held that the land adjacent to the sluice does not stand vested in the Panchayath and that therefore, the Panchayat had no right to auction fishing rights adjacent to the sluices. Even though, the learned standing Counsel for the Panchayath attempted to draw a distinction between the facts of this case and the case decided, on the plea that the Panchayath has attempted to enforce the fishing right attached to the thodu alone, I find his attempt is forgetting about the specific contentions that had been raised in Ext.P6. It had been definitely indicated that the attempt was to catch hold of the crop of fish that were travelling to the sluice and on from the field.

6. The decision of the bench is an answer to the claim of the Panchayat. Irrigation means supplying land with water, by artificial means, (Random House Dictionary). The presence of the sluice, makes the area out of bounds for the Panchayath, at least for the purpose of a dominant occupation of the appurtenant area, excluding the land holders, who get their holding irrigated. Thus, the Panchayath is incapacitated from imposing itself, as has been attempted to be done by way of Ext.P6. "

7. Taking note of the facts that are highlighted in this Original Petition, I hold that Ext.P6 has been issued without jurisdiction and without any justification. Of course, against Ext.P6, petitioner could have resorted to statutory remedies of appeal. As seen from the circumstances of the case, they were in need of immediate interlocutory orders and it cannot be stated that it was not justified for them to invoke the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

10. In view of the aforesaid judgments rendered by this Court, I must uphold the contention of the petitioner that the Panchayat is not entitled to interfere with the fish farming at the padasekharam and collection of yield at the sluices maintained by the Minor Irrigation Department, since it is a work of irrigation, which stands excluded from vesting by virtue of the proviso to Section 218 of the Act.

11. However, the learned Counsel for the Panchayat relied on the provisions contained in the Kerala Irrigation and Water Conservation Act, 2003, and placed reliance on Sections 13 and 14 of the said Act. Section 13 provides for entrustment of irrigation work, which enables the Government to entrust the construction or maintenance, or both of any irrigation work to any local authority. Similarly, Section 14 provides that the construction and maintenance of irrigation

works within the limit of a local authority, shall subject to the provisions of the Panchayat Raj Act, devolve upon the Panchayat. Sub-section (2) provides that where a local authority is unable to carry out the construction and maintenance of any irrigation work devolved upon it under Sub-section (1), the Government may, on written request from the said local authority, carry out such work or entrust such work, subject to such terms and conditions as may be specified.

12. The 2nd respondent in this Writ Petition has filed an additional counter affidavit, where it is stated that, at the request of the Panchayat, the Minor Irrigation Department is maintaining the sluice in question. It is also stated that for the benefit extended to the local cultivators, the local body is entitled to collect cess as provided in the Act. Evidently therefore, there has not been any entrustment of irrigation works to the Panchayat as contemplated u/s 13, nor is the Panchayat maintaining the irrigation work as provided u/s 14(1) of the Act. On the other hand, in view of the incapability of the Panchayat to maintain the irrigation work, at its request as provided u/s 14(2) of the Act, the Minor Irrigation Department is continuing to maintain the irrigation work. These provisions do not in any way render the proviso to Section 218 of the Panchayat Raj Act, 1994, ineffective. Therefore, at best, it may be possible for the Panchayat to collect cess, on which right this Court need not make a pronouncement in this proceedings. In any case, the Panchayat does not have any right to collect any amount from the prawn farmers of the padasekharam for using the area adjacent to the sluices for collecting the prawns grown in the padasekharam.

13. The learned Counsel for the Panchayat also placed reliance on Ext.P2, a judgment rendered by this Court, and contended that in the said judgment, the petitioners have accepted their liability to pay the amount as claimed by the Panchayat. However, a reading of the judgment shows that the judgment was rendered on an agreed basis and that there has not been any adjudication of the respective rights of the parties.

14. The learned Counsel also placed reliance on Exts.R1(g) and R1(h) road registers, to contend that roads have been constructed by the Panchayat over the sluice, and therefore, the facts of this case are different from the facts dealt with by this Court in the two judgments referred to earlier. However, the fact that road has been constructed over the sluice, which is a work of the Irrigation, does not in any manner improve the rights of the Panchayat and nor does it enable the Panchayat to claim any amount from the prawn farming community.

15. On an overall consideration, I am satisfied that the petitioner is entitled to succeed, and therefore, it is declared that the respondent Panchayat has no manner of authority over the sluice at the Kalatharachira Kochuchira Bund and that the Panchayat has no authority to auction the right of prawn farming/fishing at the petitioner's padasekharam or at the sluices.

16. It is seen that pursuant to the interim orders passed by this, Court, the

amount realised by the Panchayat during the pendency of the Writ Petition has been kept in a separate account.

Now that the Writ Petition is allowed, it is directed that any amount that has been realised and retained by the Panchayat shall be released to the petitioner. It is made clear that this judgment has been rendered accepting the factual assertion made by the petitioner that the entire prawn farming is done within the area of the padasekharam, and not in the area covered by the natural watercourse. If according to the Panchayat, any area vested in it u/s 218(1) of the Act is used by the petitioner for any purpose related to the prawn farming, this judgment will not stand in the way of the Panchayat in realising its dues.

The Writ Petition is allowed as above.