

(2016) 11 KL CK 0080
In the High Court Of Kerala
Case No : WP(C). No. 16945 of 2008 (P)

K.K. Viswanathan Master

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 30-11-2016

Acts Referred:

Kerala Panchayat Raj Act, 1994 — Section 189, Section 215, Section 215(9), Section 253

Kerala Public Accountants Act, 1963 — Section 8

Citation : (2017) 1 KerLJ 646

Hon'ble Judges : Mr. K.Vinod Chandran, J.

Bench : Single Bench

Advocate : Sri. George Poonthottam, Advocate, for the Petitioner; Sr. Government Pleader Sri. Renil Anto, Advocate, for the Respondent Nos. 1 to 3; Sri. Rajesh Nair, Advocate, for the Respondent No. 4; Sri. P.C. Sasidharan, Advocate, for the Respondent No. 5

Final Decision : Allowed

Judgement

Mr. K.Vinod Chandran, J.—The petitioners, the President and Vice President in W.P.(C) No.16945 of 2008 and the Secretary in W.P.(C) No.27838 of 2008, of the respondent Panchayath during 2000-2001 are before this Court challenging the recovery attempted by the respondent Panchayath.

2. The recovery was of an amount of Rs.2,51,726/-, which is alleged to have been wastefully expended in the construction of a compound wall and digging of a well; using the funds of the Panchayath. The three petitioners were asked to pay the amounts in equal proportion of Rs.83,909/- with interest @18% from 29.01.2001, within 15 days of the receipt of the notices dated 29.05.2008 produced in W.P.(C) No.16945 of 2008 as Ext.P2 and Ext.P6 in W.P.(C) No.27838 of 2008 dated 24.06.2008. The proceedings for recovery is said to have been issued in pursuance to orders issued by the Director of Panchayaths, produced as Ext.P3 in both the writ petitions. The learned Counsel for the petitioners submit that there is no power conferred on the Director to make such a recovery without

computation of loss and fixation of liability.

3. I have heard the learned Counsel for the petitioners, learned Counsel appearing for the respondent Panchayath and also the learned Counsel for the additional 5th respondent impleaded in W.P.(C) No.16945 of 2008, on whose complaint the proceedings were commenced.

4. The respondents have various contentions to sustain the order passed. The counter affidavit in W.P.(C) No.16945 of 2008 is referred to and reliance placed on Ext.R4(a) audit report for the year 2000-01. Item No.37 is pointed out, which deals with the compound wall construction around the office of the Panchayath. It is seen that the Auditor has noticed the withdrawals made on various dates between 14.02.2001 and 30.03.2001, being a total amount of Rs.3,00,000/-. It was found by the Auditor that there is no estimate, bill or sanction obtained for the withdrawal and expenditure of such amounts. On the basis of the special audit so conducted, it is submitted that the Panchayath has the authority to proceed for recovery as is provided under the Kerala Panchayath Raj (Manner or Inspection and Audit System) Rules, 1997 (for brevity "the Rules of 1997"). It is also alternatively contended that the Kerala Local Fund Audit Act, 1994 (for brevity "the Act of 1994") also provides for recovery of surcharge from any person, who is found to have caused loss to the local authority or the Government.

5. Further reliance is placed on Section 189 of the Kerala Panchayath Raj Act, 1994 (for brevity "Panchayath Raj Act") to contend that the Government on an enquiry ordered as per sub-section (2) of Section 189 of the Panchayath Raj Act has directed recovery of the amounts from the President, Vice President and the Secretary, all of whom were members of the sub-committee which was in charge of the works. The amounts so found to have been withdrawn and expended without any supporting receipts, could be recovered under Section 215 of the Panchayath Raj Act or under the Kerala Public Accountants Act, 1963 (for brevity "the Public Accountants Act") goes the arguments. It is pertinent to note that the Government in its counter affidavit categorically states that the recovery is pursuant to the enquiry under Section 189 and not under the Act of 1994 or Rules of 1997.

6. At the out set, it is to be noticed that despite a special audit having been conducted, there is nothing in Ext.R4(a) report which charged such expenditure disallowed, on the President, Vice President or the Secretary. The Act of 1994 has provisions which are in pari materia with Section 215 of the Panchayath Raj Act. Section 16 in the Act of 1994 and Section 215 of the Panchayath Raj Act provide for surcharging of irregular, illegal or improper expenditure or failure to recover moneys due or loss or waste of money caused by negligence or misconduct, by the auditor on the person concerned.

7. Sub-section(1) of Section 16 of the Act of 1994 specifically provides for disallowance of any item, which appears to the Auditor to be contrary to law and

provides for surcharging of the same against the persons or body of persons authorising the illegal payment and permits charge on such persons, responsible therefore the amount of any deficiency or loss caused by the negligence or misconduct of that person. Sub-section(2) of Section 16 of the Act of 1994 also mandates that the Auditor shall state in writing the reasons for his decision in respect of every disallowance or surcharge or charge and shall communicate the same by registered post to the persons against whom, it is made, together with an extract of the relevant objection in the audit report. An appeal is provided to the District Court by which sub-section(4) of Section 16 of the Act of 1994 provides for recovery under the provisions of the Kerala Revenue Recovery Act, 1968 (for brevity R.R. Act").

8. In the present case, there can be no contention raised on the basis of the Act of 1994, since the procedure as contemplated in Section 16 has not been followed. But for the audit report, in which objections have been raised against the expenditure of Rs.3,00,000/-, which was withdrawn for the purpose of constructing the compound wall, there is no charge created nor the responsibility fixed on any persons.

9. The further contention is with respect to Section 215 and the Rules of 1997. As was noticed above the recovery, if not under the Act of 1994, the proceedings could be initiated under Section 215. Sub-section(9) of Section 215 speaks of a reasonable opportunity to a person concerned, before disallowance is made and a charge created on that person. Sub-section (10) mandates a written order by the auditor and sub-section (11) provides for an appeal to the District Court. The procedure for audit is further delineated in the Rules of 1997 framed under the Panchayath Raj Act, which also speaks of a special audit and performance audit. In the present case, the records reveal such a special audit having been conducted. The discrepancy noticed under the Act of 1994 as to there being no liability fixed or charged on a person is applicable to the contentions raised under the Rules of 1997 also. Rule 22 of the Rules of 1997 speaks of the liability for loss, expenditure and misappropriation of money and liability for misconduct and wilful negligence to be mulcted on the President, Vice President and Standing Committee Chairman, members or Secretary of the Panchayath and provides for a recovery under Section 253 of the Panchayath Raj Act. Section 253 as it existed in the Panchayath Raj Act provided for revenue recovery against the members or the office bearers, who are fixed with liability under Rule 22 of the Rules of 1997. Section 253 of the Panchayath Raj Act however was omitted by the Act 13 of 1999 w.e.f. 01.10.2000. Hence there could not have been a recovery initiated under the R.R Act if the proceedings were under Section 215 or the Rules of 1997.

10. The last contention is raised based on sub-section (2) of Section 189 of the Panchayath Raj Act. Sub-section(2) of Section 189 of the Panchayath Raj Act speaks of any enquiry to be arranged by the Government, to which the Panchayath would co-operate. The specific contention of the Government in their

counter affidavit is that the recovery is based on an enquiry conducted under Section 215 and that the deletion of Section 253 is of no import since the Rules of 1997 was never invoked and there was no audit conducted as provided in the Rules of 1997. The contention taken is specious and contrary to the facts placed on record; of a special audit having been conducted. An audit can be conducted only under the Act of 1994 or the Rules of 1997.

11. Assuming for a moment that the report at Ext.R4(a) is on an enquiry ordered under Section 189; then there should be computation of loss and fixation of liability. The report speaks of disallowance of Rs.3,00,000/- withdrawn and expended in the construction of a wall. The amount sought to be recovered is expenditure under two heads: construction of a wall and digging of a well. The amounts are also lesser than that indicated under Ext. R4(a). Hence there was a computation of loss made, but without notice to the petitioners and behind their back. Presumably the computation was made by the officer to whom Ext.R4(a) was made, ie: the Director of Panchayaths. It is that officer who directed recovery to be made as is discernible from Ext.P3 and also the impugned recovery notices. The direction was also to recover the amounts from those responsible. The liability hence was not fixed by the Director and it was left to the Secretary; so to do. The Secretary again without any notice fixed the liability on the sub-committee members. A proper computation of loss and fixation of liability if at all, would in any case have rendered helpless the Government or the Panchayath from effecting a recovery since Section 189 does not provide for it. On detection of the irregularity a suit could have been filed in which case the Court could have computed the liability and also fixed the responsibility, in which event, the recovery also could have been effected. But however, the said measure was not taken and now the laws of limitation work against that.

12. Yet another contention was raised on the basis of the Public Accountants Act. Suffice it to notice that the definition of public accountant does not take in the President or Vice President of the local authority. Even if the Secretary would come within in the definition of a public accountant, there is not seen any proceedings taken by the Collector or his designate under Section 8 of the Public Accountants Act and in such circumstance no reliance can be placed on the said Act.

13. The learned Counsel for the respondent Panchayath and the additional 5th respondent in W.P(C) No.16945 of 2008 seeks for a remand to initiate appropriate proceedings. The learned Counsel for the petitioner points to Section 215 of the Panchayath Raj Act and proviso to sub-section (9) of Section 215 to emphasise that no surcharge shall be made after a period of four years from the date on which the expenditure was incurred. The expenditure was incurred in the year 2000-01. In such circumstance, at this distance of time, ie; almost 15 years from the relevant period, there can be no remand made or a surcharge permitted. This is a clear instance of the public authorities having fretted without avail and fumbled in taking appropriate proceedings for recovery against erring

officials and Councilors of a local authority; despite there being three avenues; under the Act of 1994 or the Rules of 1997 or at least the Public Accountants Act against the official; to compute loss, fix liability and effect recovery.

14. In the result, W.P.(C) Nos.16945 of 2008 and 27838 of 2008 are allowed, setting aside the impugned orders. No costs.