

(2013) 10 KL CK 0025

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 12579 of 2012 (V)

Kuriyakose Thomas

APPELLANT

Vs

Ombudsman For Local Self Government Institution and
Others

RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Citation : (2014) 1 ILR (Ker) 366 : (2013) 4 KHC 455 : (2013) 4 KLJ 440

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : P. Thomas Geeverghese, for the Appellant; Binu Paul, for R2, Sri. Noushad Thottathil, Government Pleader for R3 and 4, Sri. Renjith Thampan and Sri. S. Renjith, for R5, for the Respondent

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—The petitioner challenges Ext. P7 order of the Ombudsman and the consequent resolution taken by the Panchayath to provide a pathway to the 5th respondent through the puramboke in Survey No. 534/2 of Block No. 30 of Rayamangalam Village. The petitioner alleges that this would result in filling up of a pond in the puramboke resulting in the water logging of his neighbouring property. It is alleged that the resolution merely seeks to provide a pathway to the property of the 5th respondent. Rough sketch showing the lie of the properties have been produced by the petitioner and the 5th respondent, which are more or less the same and Ext. P15 produced by the petitioner is referred to, in this judgment. The 5th respondent who has adjacent properties to the north and south-east of the petitioner's property maintains that he has offered for surrender, land belonging to him, and that purchased by him, providing a pathway from the canal bund road lying at the western extremity, so as to provide access to the puramboke. It is his contention that as a quid pro quo the Panchayath offered him access through the puramboke, from north to south so as to reach his own property lying at the southern end. The 5th respondent's

contention at first blush, seems to be above board; but the consequences of the alleged quid pro quo has to be examined in the context of the entire facts.

2. The petitioner has produced Ext. P1, which is the basic tax register, showing the puramboke comprising a pond which is described as "Government Pond" in Survey No. 534/2 and the report of the Village Officer (Ext. P12). It is admitted by both sides that the puramboke is within the jurisdictional area of the Grama Panchayath. But all the same being a pond, it does vest with the Panchayath, is the contention of the 5th respondent.

3. The learned Senior Counsel, Sri. Renjith Thamban, appearing for the 5th respondent would rely on Section 218 of the Kerala Panchayath Raj Act, 1994, to contend that all rights and liabilities of the Government in relation to water courses including "standing and flowing water" shall vest with the Village-Panchayath. The pond being "standing water", it is the contention, that it vests with the Panchayath.

4. The learned counsel for the petitioner would counter the argument of vesting, placing reliance on the Kerala Irrigation and Water Conservation Act, 2003 (for brevity, "Act of 2003"). It is the petitioner's contention that Section 3 is a non-obstinate clause deeming all water courses as the property of the Government. The definition of water course in Section 2(aq) also takes in "natural collection of water" and the Act of 2003 being a later enactment; by virtue of the non-obstante clause would prevail; is the contention. However, it is to be noticed that Section 3 of the Act of 2003 is subject to the provisions of Section 218 of the Kerala Panchayath Raj Act, 1994. Hence that contention of the petitioner fails, however, it is to be noticed that the contention of vesting raised by the 5th respondent is contrary to his consistent stand, as revealed from the records, that there is no pond in existence.

5. The resolution taken by the Panchayath produced as Ext. R5(e) is worded as if it is in compliance of Ext. P7 order. The 5th respondent initially filed Ext. P3 complaint before the Panchayath alleging encroachment upon the puramboke and demanding measurement of the puramboke, the properties of the petitioner and the 5th respondent. A lawyer's notice was also issued as per Ext. P4. Presumably, when no action was forthcoming, the 5th respondent filed an application before the Deputy Director of Panchayaths, Kakkanad, produced as Ext. P5, wherein the respondent Panchayath as also the petitioner were parties. This application also reiterated the reliefs earlier sought. It would be apposite to mention here that the reliefs claimed by the 5th respondent, being fixation of boundaries, could not have been granted by the local authority and the 5th respondent would have been better advised to pursue civil remedies.

6. Subsequently, Ext. P6 application was filed before the Ombudsman. The Secretary and the President of the respondent Panchayath were alone made parties. Though, the allegation was encroachment by a "private individual" (sic); he was not made a party. The Taluk Surveyors of Kunnathunadu and

Perumbavoor, were cited as persons having knowledge of the dispute, since what was attempted was a measurement of the properties by the surveyor; clearly to circumvent the civil remedies available.

7. In the application produced as Ext. P6, Ext. P7 order was made, which does not disclose as to what enquiry the learned Ombudsman made with respect to the complaint. Submissions on either side with respect to measurement of properties of neighbouring property owners, were recorded and directions were given to the Taluk Surveyor to measure the property and demarcate the puramboke land. In conclusion, on the submission of the 5th respondent that he is ready to surrender land for the purpose of constructing a road, directions were issued to the Secretary and the petitioner to negotiate and "fix it accordingly" (sic).

8. The Panchayath, as the records reveal at present, does not have any claim over the puramboke land since the Panchayath merely asserts that, they were in possession of the puramboke without any thing more to substantiate vesting of the puramboke in the Panchayath. However, the learned counsel for the Panchayath would rely on the representations of the local people to the Panchayath, regarding utilisation of the land to establish their claim. That the puramboke was of the Government is undisputed going by the Basic Tax Register and Ext. P12 report. The Panchayath does not have a case that they were granted any assignment by the Government. The Panchayath cannot be conferred with the possession and rights over the puramboke land merely because the residents thought it fit to represent the Panchayath for developmental activities to be carried on in the puramboke land, presumably for the benefit of the general public.

9. The Secretary of the Panchayath also affirms on affidavit that there is no pond in the puramboke land, contrary to the contention of vesting u/s 218. The vesting of the pond in the Village-Panchayath u/s 218 in the opinion of this Court, would not enable them to fill up the same and provide access to an individual. The records reveal that the residents of the locality had made representations (Ext. P8 and P9) to the Panchayath and the RDO to restore the pond to a usable condition so as to alleviate the drinking problems in the locality. It is also to be noticed that the IIrd Schedule of the Kerala Panchayath Raj Act, 1994, dealing with the functions of Village-Panchayath, includes, under the head Mandatory Functions, as item No. 4 "preservation of ponds and other water tanks". It is very pertinent that it is the consistent case of the 5th respondent and the Panchayath that there is no pond in the puramboke land. The 5th respondent even opposes the report of the RDO that there is in existence a pond in the report. It is contrary to this contention that the argument of vesting is raised.

10. The dispute boils down to whether there is in existence a pond, or not in the property and it is on the contrary assertions made by the parties that this Court directed the RDO to file a report, which has been filed as report dated

04.09.2012, which reads as under:

(1) In obedience to the order of the Hon"ble Court in the above case dated 07.08.2012, I had inspected the pond along with the Village Officer, Rayamangalam Village in Re-Sy. No. 534/2 of Block No. 30 of Rayamangalam Village on 27.08.2012.

(2) The pond is situated in Re-Sy. No. 534/2 of Block No. 30 in Rayamangalam Village. The pond is having an average 16 meter width and 30 meter length and a depth of about 6 feet. The pond is situated in 13.5 cents of land and seems to be still in a useful condition with at least = feet of water in the centre.

11. In the context of the RDO having reported that there is a pond in existence, the further question is whether there can be a filling up of the pond and that too by the Panchayath for the purpose of providing an access through the puramboke property to the 5th respondent merely on his having agreed to surrender land for the purpose of providing access to the puramboke. The 5th respondent has filed an application for appointment of a Commissioner to verify the existence of a pond. That there is a pond in existence is borne out by the revenue records; consistent with which, the RDO has filed report. The 5th respondent lays emphasis on the fact that the depth of water reported is minimal. In juxtaposition is the contention of the petitioner that the 5th respondent has been trying to fill up the pond. As at present there is no warrant for disbelieving the report of the RDO. The Commission application hence is dismissed.

12. Neither the public nor the Panchayath or even the Government has any claim for access to the puramboke. It is also not possible from the records available before this Court to come to a definite finding as to an access or lack of it to the puramboke land. Evidently, the attempt of the 5th respondent is to enable an access to his property lying to the southern extremity and to that end the 5th respondent has circumvented the due process of law and the Panchayath has provided willing assistance. The 5th respondent's claim before the Panchayath was for fixation of boundaries and removal of encroachment, inaction on which was complained of before the Ombudsman.

13. The Ombudsman for Local Self Government Institutions has been constituted under Chapter XXV B of the Panchayath Raj Act. The functions of the Ombudsman u/s 271J includes investigation and enquiry into any allegation contained in a complaint or on a reference from the Government; or something that has come to the notice of the Ombudsman. Looking at the scheme of the constitution of the Ombudsman, it is one constituted to enquire or investigate into complaints of corruption or maladministration. The Ombudsman also has the power to pass an order compensating loss or inconvenience to a citizen from an individual or from the Local Self Government Institutions (LSGI) and if any irregularity is due to the omission or inaction; the power to rectify the mistake.

14. Examining the sweep of the words "any allegation in a complaint" found in Section 271J(1)(i), this Court has in John Vs. Changanacherry Municipality, held

that a money claim will not come under it unless the claim is alleged to be on the basis of an act of maladministration. It is so held after looking at the definition of "allegation" and "complaint"; which are extracted hereunder:

271F. Definitions:- (1)(b) allegation:-

(a) in relation to a public servant means, any affirmation that such public servant,-

(i) has abused his position as such for any gain or favour to himself or to any other person or to cause undue harm or hardship to any other person;

(ii) was actuated in the discharge of his functions as such public servant by personal interest or improper or corrupt motives;

(iii) is guilty of any action as public servant which facilitates or causes to make any loss, waste or misapplication of money or other property of the Local Self Government Institution.

(b) In relation to a Local Self Government Institution means any affirmation that such Local Self Government Institution has defaulted or acted in excess of its powers in the discharge of its functions imposed on it by law or in implementing the lawful orders and directions of the Government;

(1)(c) "Complaint" means a statement of allegation that a public servant or a Local Self Government Institution is guilty of corruption or maladministration and includes any reference to an allegation in respect of which suo motu enquiry has been proposed or recommendation for enquiry has been made by Government.

15. Hence the complaint should contain an allegation against a "Public Servant" or the LSGI. Public Servant is defined u/s 271F(1)(g) as an employee or officer under the LSGI or an elected member. When the complaint is against the Public Servant the allegation should be either of an abuse of position, an act vitiated by personal interest or improper or corrupt motives, an act of corruption etc or any act causing loss to the LSGI. As against the LSGI the allegation could be of any act or omission in its statutory functions or in implementing lawful directions of the Government. This Court does not find any such allegation or complaint in Ext. P6.

16. In the present case, the complaint before the Ombudsman was for demarcation of boundaries and removal of encroachment, which powers are not conferred on the LSGI. In the complaint so filed, measurement of properties, demarcation of boundaries etc. was directed. In the opinion of this Court, this exercise should have been ideally done by a Civil Court in a properly instituted proceeding and there ought to have been an adjudication on the basis of such report of measurement and demarcation as also the pleadings and other evidence adduced by parties. That obviously did not happen and the petitioner herein, who was a party in the complaint filed before the LSGI, was also not made a party before the Ombudsman.

17. After issuing the aforesaid directions, the petitioner's willingness to surrender land was recorded and there was a direction to the Secretary and the petitioner to negotiate and fix the construction of a road accordingly. The Ombudsman ought to have noticed that it was compelling a public authority, to negotiate with an individual and settle the laying of a road, which does not enure to the benefit of anyone else, atleast, as has been projected before the Ombudsman in Ext. P6. It is to be noticed that the contention of providing an access to the puramboke and the quid pro quo, raised by the 5th respondent, is raised for the first time before this Court. The complaints Exts. P3, P4 and P5 as also the application before the Ombudsman does not reveal such a scheme. The attempt obviously was to lay a road on the premise that the Ombudsman for LSGI has directed it, as is clear from the resolution passed by the Panchayath. This Court is of the opinion that Ext. P7 order was beyond the jurisdiction of the Ombudsman, since Ext. P6 contained no allegation which the Ombudsman could have validly looked into.

18. The subsequent resolution made by the Panchayath in purported compliance of the order of the Ombudsman cannot also be sustained. The contention of vesting u/s 218 of the Panchayath Act cannot necessarily clothe the Panchayath with the power to fill up the pond, since the statutory mandate is to ensure preservation of ponds. It is to be stated that the respondent Panchayath is faced with a conundrum of sorts. If the Panchayath's contention that there is no pond in the puramboke land is accepted, then the Panchayath cannot have any right over it unless duly assigned. However, if there is in existence a pond, then there is no requirement of assignment since it vests in the Panchayath u/s 218; in which case a duty is cast on the Panchayath to preserve the pond. In the circumstances, this Court is of the opinion that Ext. P7 order has to be set aside and the Panchayath cannot act on Ext. R5(e) resolution purportedly passed in pursuance of the order of the Ombudsman. The pond found to be existence cannot be filled up. The writ petition hence stands allowed. However, subject to the right of the Panchayath to approach the appropriate authorities for getting assignment of the puramboke land, if so advised, and only if, in accordance with law, any land is assignable; definitely not including the pond. Parties are left to suffer their respective costs.