
(2014) 11 KL CK 0114
In the High Court Of Kerala
Case No : WP (C). No. 26885 of 2013 (I)

Kuthrathodu Nellulpadaka Karshaka Sangham

APPELLANT

Vs

Nayarambalam Grama Panchayath

RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Kerala Panchayat Raj Act, 1994 — Section 166(2)

Citation : (2014) 11 KL CK 0114

Hon'ble Judges : A.V. Ramakrishna Pillai, J

Bench : Single Bench

Advocate : K.S. Madhusoodanan, Thomas Chazhukkar, M.M. Vinod Kumar, P.K. Rakesh Kumar and K.S. Mizver, Advocate for the Appellant; A.X. Varghese and A.V. Jojo, Advocate for the Respondent

Judgement

A.V. Ramakrishna Pillai, J.—Exts. P7, P8, P14 and P16 are under challenge in this writ petition.

2. The petitioner alleges that from the year 1975 onwards, the members of the petitioner society, which is a farmers society, are utilising poramboke land by name "Kuthrathodu" having an extent of 2 acres and 32 cents vested with the respondent panchayat. According to them, the aforesaid canal is adjacent to the paddy fields of the members of the petitioner society. The petitioner further alleges that by Ext. P3 Government order dated 15.5.2003, the Government approved the right of the members of the society to get lease of the aforesaid canal for aqua culture. When the respondent insisted 5% increase per annum as lease amount for using the aforesaid thodu ignoring its own Resolution No. 16 dated 4.12.2008 for proportionate area wise lease rate, the petitioner approached this Court with W.P. (C) No. 30357 of 2011. Consequently, the Local Self Department of the State sanctioned proportionate area wise lease rate instead of yearly 5% enhancement by Ext. P4 order.

3. The petitioner further alleged that by Ext. P5 dated 30.10.2012, the respondent panchayat prohibited operation of sluice belonging to the petitioner

fixed at the southern end of the aforesaid canal and by Ext. P6 order, this Court directed the respondent not to remove the sluice until further orders. The petitioner further alleges that ignoring Government orders and orders of this Court, the respondent published Ext. P7 notice putting auction of right to purchase fish from Kuthrathode on 4.11.2013. The petitioner applied for lease of the said canal for aqua culture on 28.10.2013 as usual. However, by Ext. P8 dated 30.10.2013, the respondent rejected the application under the disguise of Ext. P7.

4. In the writ petition which originally stood, the petitioner challenged Exts. P7 and P8 only. Subsequently, the writ petition was amended as per orders on I.A. No. 15625 of 2014 incorporating the prayer to quash Exts. R1(e), R1(f) and R1(g) (Exts. P14 to P16) also, as those exhibits were brought to the notice of the petitioner subsequent to the filing of the W.P. (C).

5. The respondent panchayat which resisted the writ petition, took the following contentions:

"The respondent contended that it is evident by Ext. P1 agreement that based on the decision of the panchayat committee the property of the panchayat was leased to one Aysha Pradakshan with effect from 10.11.1998 to 15.04.1999. Thus, there is no justification or sustainable ground to claim continuous lease of the property of the panchayat to the petitioner without support of panchayat resolution. Further the petitioner Sangham was registered only recently i.e. In the year 2013. The contention of the respondent is that the sluice situated in the petitioner's property belongs to the panchayat and while granting lease, the lessee concerned is directed to maintain the sluice from time to time.

It was further contended that Ext. P4 would not give any right to the petitioner for getting lease hold right over the property of the respondent for the year commencing from 15.11.2013 to 15.4.2014, since Ext. P4 was passed for getting the lease hold right for the year 2003. The respondent further contended that after passing the resolution dated 4.12.2008 for area wise lease rate, the respondent forwarded the same to the Secretary, Local Self Government Department, Trivandrum for its approval.

At this juncture, the petitioner along with another approached this Court with W.P. (C) No. 30357 of 2011 which was disposed of on 19.6.2012 directing the first respondent therein to convey the decision on Ext. P1 resolution forwarded by the panchayat to the 2nd therein within a period of three months. In pursuance to the said direction, the Secretary, Local Self Government Department passed Ext. P4. It is evident from Ext. P4 order that public auction were conducted for granting lease of 11 canals of the panchayat for prawn cultivation. But the petitioner wants autonomous lease hold right over the property belonging to the panchayat.

The respondent stated that Ext. P5 was issued when the petitioner encroached into the property of the respondent. The respondent further contended that as

stated above for conducting prawn cultivation the respondent published auction notice and the lease hold right was granted to the highest bidder. After conducting the auction, a lease agreement was executed with the highest bidder. Thus, it can be seen that there is no discrimination shown by the respondent to the petitioner as alleged in the writ petition. It was further stated that on 18.10.2013 the standing committee as per Decision No. 5 decided to conduct auction for prawn cultivation in Kuthrathodu. Thereafter on 24.10.2013, the development standing committee of the respondent as per decision No. 3 decided to request the general committee for public auction for leasing Kuthrathodu, belonged to the panchayat. Thereafter on 26.10.2013 as per Decision No. 5 the panchayat decided to accord sanction to the decision of the panchayat committee. Pursuant to the said decision of the panchayat Ext. P7 auction notice was issued on 26.10.2013. Though the petitioner is very well aware about the resolution passed by the panchayat, submitted a request on 28.10.2013 for granting lease in its favour.

Since the decision of the panchayat is against the request of the petitioner Ext. P8 was issued rejecting the said request. But, without challenging the decision of the panchayat, the petitioner approached this Court with the present writ petition that too, without producing his request dated 28.10.2013 (Ext. R1(h)). The intention of the petitioner was to stall public auction. The period of prawn cultivation for last year started on 15.1.2013.

It was further contended that under Section 166(2), the panchayat shall have exclusive power to administer the matters enumerated in 3rd schedule and to prepare and implement schemes relating thereto for economic development and social justice. In the case on hand they decided to conduct auction for leasing the Kuthrathodu for prawn cultivation and the petitioner has no legal right to claim right over the property belonging to the panchayat. They further contended that the grounds raised in the writ petition is not sustainable and liable to be discarded. Therefore, they prayed for dismissal of the writ petition."

6. In the additional counter affidavit, the respondent have taken the following contention:

"It was contended that the petitioner is not entitled to get any of the reliefs as prayed for, since the original prayer as well as the additional prayer has become infructuous. It was stated that a learned Single Judge of this Court heard the matter finally on 13.11.2013 and reserved for judgment. But on 15.11.2013, taking advantage of the interim order passed in the earlier writ petition, the petitioner encroached into the property of the panchayat unauthorisedly and installed a sluice. Therefore, by detailed order dated 27.11.2013 the learned Single Judge vacated the interim order of stay of operation in Ext. P8. Thereafter the respondent panchayat conducted public auction of the Kuthrathodu and auctioned the lease hold right of the property to the highest bidder namely Dharmajan T.K. Thachangatt, Nayarambalam for an amount of 21,200/-. Thus, it can be seen that pursuant to the detailed order of this Court on 27.11.2013, the

respondent panchayat implemented decisions of the panchayat contained in Exts. P14 to P16."

7. In reply to the above, the petitioner has filed a reply affidavit.

8. Arguments have been heard.

9. Admittedly, as per Ext. P8, the respondent panchayat has resorted to auction the right to catch fish from the Kuthrathodu for the period from 15th November (1st Vrichikam) to 15th April (11th Meenam) of 2013. The stand taken by the petitioner is that as per Ext. P1 dated 23.11.98 the right to catch fish from Kuthrathodu has been leased out to the petitioner. According to them, the right of the petitioner to use the aforesaid canal for aqua culture was conceded by the respondent in favour of the petitioner. In support of the said argument, reliance was placed on Ext. P3 Government order.

10. It was further argued that in the light of Ext. P4 Government order by which the right of the petitioner has been recommended by the Government, the respondent has no right or authority to interfere with the same. It was pointed out that the liability of the petitioner to pay pattom in respect of the land alone has been made mention of in Ext. P4. This Court by an interim order restrained the respondent panchayat to remove the sluice. However, subsequently the learned counsel for the respondent panchayat informed the learned Single Judge, who heard this writ petition, that the petitioner has taken law into its hands and altered the status quo that was being maintained on the basis of the interim order of this Court. Therefore, the respondent sought to vacate the interim order.

11. The learned Single Judge after hearing both sides vacated the interim order as per order dated 27.11.2013. Though this was pointed out as a serious circumstance to non suit the petitioner, this Court is of the view that those are closed chapters. At present, the only question that has to be considered is whether the petitioner society is entitled to get the relief as prayed for in this writ petition.

12. One of the contention raised by the learned counsel for the respondent panchayat is that the sluice belonged to the panchayat. It appears to be incorrect in the light of Ext. P9, which is the copy of the notice dated 5.4.2013 by which, the ownership of the petitioner over this sluice was admitted and the petitioner was asked to remove the sluice installed by the petitioner.

13. As admitted in paragraph (6) of the counter affidavit on 4.12.2008, the respondent panchayat passed a resolution seeking sanction for area wise lease rate which led to the Government to pass Ext. P4 order through the intervention of this Court in Ext. R1(b) judgment. In this context, the learned counsel for the petitioner would argue that it is profitable to recall the circumstances which led to the passing of the resolution. It was pointed out that the panchayat took into account the huge expenditure, including making and fixing of sluice and loss accumulated in the last so many years from aqua culture by the farmers. Hence

the panchayat resolved in 2008 onwards to agree for area wise lease rate, instead of 5% annual increase. However, this was subject to the sanction from the Government. This is evidenced by Ext. P10 which is the photocopy of Decision No. 16 (a) dated 4.12.2008.

14. Ext. P3 is the order dated 15.5.2003 by which, the Government approved the right to lease out Kuthrathodu to the members of the petitioner society for aqua culture. As the petitioner's right to lease was acceded to by the respondent panchayat as evident from Ext. P3 Government order and the Government by Ext. P4 order has sanctioned area wise lease rate, the respondent panchayat cannot now turn round and say that the petitioner is not entitled to get the lease hold right.

15. In paragraph (8) of the counter affidavit filed by the respondent panchayat, they referred to Ext. R1(c) auction notice. On a comparative reading of Ext. R1(c) and Ext. P7, it can be seen that Ext. P7 exclusively relates to Kuthrathodu for which fishing right was proposed is only for five months only i.e. from 14.11.2013 to 14.04.2014 whereas auction in Ext. R1(c) is for one year.

16. It was pointed out by the learned counsel for the petitioner that serial No. 1 in Ext. R1(c) i.e. Thekkepasuvekhar extending about 25 acres is a deep water logged area wherein only fishing operation could be carried out. It was further pointed out by the learned counsel for the petitioner that serial No. 4 in Ext. R1(c) refers to four water canals (thodu) having width of 8 to 10 metres and they have ponds on both sides. However, Kuthrathodu is lying north-south with a length of 568 metres from the sluice at the southern part and it has no bunds at all on its eastern side. On the western side there is a bund covering a distance of about 100 metre from the sluice towards north maintained by the farmers. The bund has a width of around 9.4 metres. It was further argued that most of the paddy fields of the members of the petitioner are situated towards east of the Kuthrathodu where there is no demarcating bund. In otherwords, Kuthrathodu is enclosed with the paddy fields of the members of the petitioner. Therefore, it was pointed out that if fishing right in the thodu is auctioned, it would pave way to catching of fish from the fields of the members of the petitioner wherein prone culture is being done after pokkali cultivation. In support of the argument, the learned counsel for the petitioner invited my attention to certain photographs of the locality. Two photos of Kuthrathodu showing the sluice and western bund, and the bund less portion is produced and marked as Ext. P11. One photograph of Munduchira thodu similar to other three canals having bunds on both sides is produced and marked as Ext. P12. One photograph of Punchayil thodu is produced and marked as as Ext. P13.

17. It was further pointed out that Exts. R1(c) to R1(g) referred to in paragraph (8) of the counter cannot whittle down Exts. P4 and P10. I see valid force in the said submission of the learned counsel for the petitioner, as on the request of the panchayat based on Ext. P10 resolution dated 4.12.2008, the Government have accorded sanction under Ext. P4 and the same cannot be dishonoured by the

respondent panchayat.

18. One of the arguments advanced by the learned counsel for the respondent panchayat was that the petitioner's challenge is belated. Such a contention is incorporated in paragraph (1) of their counter affidavit. But, I cannot accept the said contention because Ext. P7 is dated 30.10.2013 and the writ petition was filed on 1.11.2013. As there is no appeal or revision against the impugned orders, the only remedy available to the petitioner was to invoke the writ jurisdiction of this Court.

19. It was strenuously argued by the learned counsel for the respondent panchayat that Section 166(2) of the Kerala Panchayat Raj Act gave exclusive power to the respondent to administer the matters enumerated in third schedule and to prepare and to implement schemes relating thereto for economic development and social justice. The learned counsel for the respondent pointed out that in the case on hand, the panchayat had decided to conduct auction for leasing Kuthrathodu for prawn cultivation and the petitioner has no legal right to claim right over the property belonging to the panchayat.

20. However, it is relevant to note that Schedule III(4)(a) of the Kerala Panchayat Raj Act is intended for the development of inland fisheries through leasing of public waters and not to cause havoc to the adjoining farmers. The argument that leasing Kuthrathodu is for prawn cultivation is also not acceptable, as is evident from Ext. R1(c) notice that it was for catching fish.

21. The petitioner has specifically averred regarding the non auctioning of six water canals similarly situated to that of kuthrathode wherein lease hold right on area wise basis has already been given to the concerned farmers society. The same is not specifically denied by the respondent panchayat. Without demarcating the property with bunds, it is feasible neither for prawn cultivation, nor for catching of fish as the same would result in the encroachment of the properties of the members of the petitioner as can be discerned from the materials now placed on record. That may be reason why their right to get lease was acceded to in Ext. P3 by the Government and the area wise lease rate in Exts. P4 and P10 were fixed. Therefore, this Court is of the definite view that the petitioner is entitled to the reliefs prayed for.

In the result, the writ petition is allowed. Exts. P7, P8, P14 and P16 are quashed. The respondent panchayat is directed to reconsider the request of the petitioner to lease out the "Kuthrathodu" in terms of Ext. P3 and P4 to the petitioner during the next season in the light of what has been stated above.