

(2015) 01 KL CK 0013

In the High Court Of Kerala

Case No : Writ Petition(C). No. 33233 of 2014 (D)

Onset Developers

APPELLANT

Vs

Secretary, Akathethara Grama Panchayat and Others

RESPONDENT

Date of Decision : 27-01-2015

Acts Referred:

Kerala Panchayat Raj Act, 1994 — Section 166, 182, 185B, 235C, 235J

Citation : (2015) 1 KHC 497 : (2015) 1 KLJ 798 : (2015) 1 KLT 668

Hon'ble Judges : Dama Seshadri Naidu, J.

Bench : Single Bench

Advocate : Rajesh Sivaramankutty, for the Appellant; U. Balagangadharan, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Dama Seshadri Naidu, J.—Briefly stated, when the petitioner initially submitted Exhibit P5 application for building permit, it was returned on the ground that the land proposed to be constructed upon comprised wet land in part. Aggrieved thereby, the petitioner, having filed W.P. (C) No. 9940/2014, invited Exhibit P1 judgment, through which this Court set aside the order (Ext.P7 therein) of the Secretary, the first respondent, and directed the said authority to consider petitioner's application afresh, without reference to the issue of wet land in terms of Kerala Conservation of Paddy Land and Wetland Act, 2008.

2. As could be seen from records, after complying with all other statutory parameters, the petitioner resubmitted his application to the first respondent, who in turn issued Exhibit P2 proposing to approve the building permit on the condition of the technical clearance from the Assistant Engineer of the Local Self Government Institutions. As was reflected in Exhibit P3, after the technical clearance was granted, the second respondent -- the Committee of Grama Panchayat -- passed resolution interdicting the permit proposed to be granted by the first respondent on the ground that any construction by the petitioner on the site would lead to traffic jams, drinking water pollution, and other health

hazards, as well as lack of provision for flow of pollutants.

3. The first respondent, in turn, based on Exhibit P3 resolution passed by the second respondent, issued Exhibit P4 proceedings rejecting the petitioner's application for building permit. Assailing Exhibit P4, the petitioner filed the present writ petition.

4. The learned counsel for the petitioner has strenuously contended that Exhibit P4 is ultra vires of the second respondent, inasmuch as there is no specific provision to which the second respondent could trace its power to interdict the decision of the first respondent, the Secretary. In that regard, he has placed reliance on a judgment rendered by this Court in Dharmadom Paristhithi Samrakshna Samiothi Vs. The Dharmadom Gramapanchayath and Another, .

5. The learned counsel has also submitted that if at all the second respondent has any power, it ought to be traced to Section 235C of the Kerala Panchayat Raj Act, which in turn requires the necessary notification to be published by the said Grama Panchayat so as to regulate the construction of any building within its limits. He has further submitted that, based on the direction of this Court earlier, the first respondent has already filed an affidavit testifying to the fact that no such notification was issued by the Grama Panchayat.

6. Strenuous efforts have been made by the learned counsel to repel the contention of the respondent Grama Panchayat on the issue of the petitioner's having an efficacious alternative remedy by way of approaching the Tribunal for Local Self Government Institutions. He would submit that only when the first respondent Secretary exercises his power under Section 235J, if any person is aggrieved thereby, he can lay challenge against the said order before the Tribunal. In other words, once it is established that an order is void on the touchstone of the principle of ultra vires, the question of alternative remedy does not arise.

7. Summing up his submissions, the learned counsel for the petitioner has urged this Court to set aside Exhibit P4, apart from issuing a consequential direction to grant the building permit to the petitioner.

8. Per contra, the learned counsel for the respondent Grama Panchayat has strenuously contended that the second respondent has got the necessary power under Section 166 of the Act. According to him, in terms of Section 166 of the Act, the activities specified in Schedule III appended to the Act could be regulated by the Committee of the Grama Panchayat. He has further submitted that once the second respondent has taken any decision, it is the duty of the first respondent Secretary, to place the matter before the Government under proviso to clause (iii) of Section 182 of the Act, if it is, in his opinion, not in accordance with law. He has further elaborated that, on such reference; if the Government could not take any decision within 15 days, it is deemed that the decision taken by the second respondent has become final.

9. Efforts have thus been made by the learned counsel for the respondent Grama Panchayat to repel the contention that the order under reference, i.e. Exhibit P4, is void being ultra vires of the second respondent. He has further contended that the Grama Panchayat has exercised its powers bona fide in public interest and it cannot be interdicted.

10. Heard the learned counsel for the petitioner and the learned Standing Counsel for the respondent Grama Panchayat, apart from perusing the record.

11. The issues that are required to be considered are whether Ext.P4 order is ultra vires of the second respondent Grama Panchayat, and whether the writ is barred in terms of Section 182 of the Act, on the principle of alternative remedy.

12. Beginning with the first issue, I may have to observe that, in so far as the vires of the second respondent is concerned, the issue is no longer res integra, inasmuch as this Court in Dharmadom Paristhithi Samrakshana Samithi (supra), having referred to various provisions of the Act, has eventually held that the power to consider and pass orders on application for building permit is exclusively conferred on the Secretary of the Panchayat, that the Committee of the Panchayat gets jurisdiction to consider an application only in a case where reference is made to it under Section 235K. It has further held that, if the power is conferred on the Secretary, the same has to be exercised in the manner as provided under Section 185B. In other words, the functions are to be discharged independently and solely by the Secretary without any interference or influence by the Panchayat, the President or Chairman of the Standing Committee.

13. The learned counsel for the second respondent has drawn my attention to Section 166 and to the III Schedule appended to the Act to underline the powers of the Grama Panchayat. On the other hand, the learned counsel for the petitioner has submitted that to assume jurisdiction over the activities enumerated in the III schedule, there ought to have been a notification under Section 235C of the Act.

14. Section 166 of the Act deals with the macro functions of the Grama Panchayat, and the legislative intention is couched in mandatory terms. Indeed, though the exercise of the powers enumerated in the III schedule is subject to the provisions of the Act, it cannot, however, be said that such discharge of mandatory functions as have been enumerated is contingent upon the Grama Panchayat issuing a notification under Section 235C of the Act. If it were to be so, it would be a simple expedient or device for the Grama Panchayat to avoid its statutory obligations simply by not notifying under Section 235C of the Act. To that extent the contention of the learned counsel for the petitioner has to be rejected.

15. It can further be seen that under Section 235C notified are the micro-functions, such as detached or continuous buildings to be raised, the elevation, the frontage of a building, architectural character of buildings destined for particular use, etc. Assuming that Section 235C had the potential of nullifying

Section 166 and the III Schedule in the absence of notification, the question of specifying the range of activities once again in Section 235C would not have arisen. The legislature, instead, could have simply referred to III Schedule, for the legislature is presumed not to waste words. Further, there is no correlation between the activities specified under III Schedule on one hand and those specified in Section 235C on the other.

16. The next issue to be considered is whether section clause (iii) 182 of the Act provides an efficacious alternative remedy. In fact, the said section enumerates the powers and functions of the Secretary. Clause (iii) of Section 182 is as follows:

"(iii) carry into effect the resolutions of the Panchayat.

Provided that where the Secretary is of opinion that any resolutions passed by the Panchayat has [sic] not been legally passed [, or] is in excess of the powers conferred by this Act or any other Act or is likely, [sic] to endanger human life, health or public safety, if implemented, he shall request in writing to [sic] the Panchayat, to review the resolution and express his views at the time of its review by the Panchayat and if the Panchayat upholds its previous decision, the matter shall be referred to the Government after intimation to the President and if no decision of the Government is received within fifteen days, the said resolution shall be implemented and information thereof shall be given to the Government;"

(emphasis added)

17. It is noteworthy that the proviso is replete with errors, grammatical or typographical. It is the contention of the learned counsel for the respondent Grama Panchayat that the petitioner has an efficacious alternative remedy under Section 182 and as such the writ petition is barred. The objection may be dealt with in three ways; namely, (1) that Section 182 can be invoked by the Secretary, but not by an affected individual, evidently an inhabitant of the Grama Panchayat; (2) that once it is demonstrated that the decision of the Grama Panchayat is ultra vires, the issue of alternative remedy, efficacious or otherwise, does not bog down the Constitutional Courts; (3) that if it were to be the legislative intention that even an order ultra vires of Grama Panchayat can have currency on the Government's inaction to take a decision within 15 days after reference by the Secretary, I am afraid, it is not only unconscionable but also susceptible to constitutional challenge.

18. At any rate, on a compendious consideration of the statutory scheme, it is discernible that the reporting to the Government by the Secretary is on the issues of policy affecting the welfare of the people of the Grama Panchayat, rather than any issue affecting a single individual. This Court, however, is inclined to overrule the objection on the second ground, namely that on an issue attacked on the ground of ultra vires, the principle of alternative remedy is no constraint for a public law remedy.

19. In the facts and circumstances, especially going by the ratio laid down by this Court in Dharmadom Paristhithi Samrakshana Samithi (supra), Exhibit P4 is clearly ultra vires of the first respondent and is accordingly required to be, and in fact is, set aside. As a consequence, the second respondent is further directed to consider the petitioner's Exhibit P5 application afresh, subject to other statutory parameters, which, it appears, have already been satisfied, as is evident from the proceedings of the first respondent, and pass appropriate orders thereon, as expeditiously as possible, at any rate, within a period of one month from the date of receipt of a copy of this judgment.

With the above observation, this writ petition is disposed of. No order as to costs.