(1979) 04 MAD CK 0022

In the Madras High Court

Case No : Writ Petition No. 1707 of 1976

V. Sivathavilli Thevar — APPELLANT

Vs

The Collector of Ramanathpuram and Another — RESPONDENT

Date of Decision : 23-04-1979

Acts Referred:

Constitution of India, 1950 — Article 226
Surcharge and Disallowance Rules — Rule 1, 5(1), 6, 6(1), 6(2)
Tamil Nadu Panchayats Act, 1958 — Section 141, 157(1), 157(2), 157(3), 157(4)

Citation : (1980) ILR (Mad) 239

Hon'ble Judges : Varadarajan, J

Bench : Single Bench

Advocate : K.T. Paul Pandian, for the Appellant; C. Chinnaswami, for Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Varadarajan, J.—This writ petition under Article 226 of the Constitution of India is for the issue of a writ of certiorari or any other appropriate writ or order calling for the records relating to proceedings No. V. 19/122828/75, dated 26th December, 1975 on the file of the Collector of Ramanathapuram at Madurai, the first Respondent, and quashing those proceedings.

2. The Petitioner V. Sivathavilli Thevar was elected directly as President of A. Punavasal Panchayat in Kadaladi Panchayat Union, Ramanathapuram District, in the year 1958 for the first time and subsequently in all the elections ending with the one held in 1970. As the President of the Village Panchayat, the Petitioner become automatically a member of the Panchayat Union and he had been elected also as Chairman of the Kadaladi Panchayat Union. On 26th December, 1975, the first Respondent, the Collector of Ramanathaparam District as the Inspector under the Tamil Nadu Panchayats Act, 1958 issued the impugned proceedings disqualifying the Petitioner from holding the post of President of the Village Panchayat and consequently of the Chairman of the Panchayat Union, on

the ground that the Petitioner had incurred certain disqualifications u/s 26(1) of that Act. Under G.O. Ms. No. 1027, R.D. & L.A. Department, dated 8th May, 1963, a scheme known as ''Rural Man Power Scheme'' was published by the Government of Tamil Nadu. By that G.O. the Kadaladi Panchayat Union was called upon to spend a certain sum of money for utilising the idle man power. Veppankulam tank work was one of the works selected under that scheme to be carried out at a cost not exceeding Rs. 6,000. The Kadaladi Panchayat Union by resolution No. 147 dated 27th July, 1963 called upon A. Punavasal Panchayat to carry out the work and issued the work order, dated 28th July, 1963. The Panchayat Union advanced a sum of Rs. 4,400, for that purpose in view of the urgency of the work. The Panchayat completed the work in or about the end of August, 1963 by utilising the said sum of Rs. 4,400. As per the provisions of the said G.O., the amount should be claimed from the Government by the Panchayat after the completion of the work. The Panchayat Union asked for reimbursement of the money advanced to the Panchayat and the Panchayat paid it out of its funds. According to the Inspector, the executive authority of the Panchayat, namely the Petitioner, did not claim the money from the Government and loss was thus caused to the Panchayat. But, according to the Petitioner, he made a claim on the Government on 17th October 1966 through the Commissioner of the Panchayat Union Council. The Panchayat Union Commissioner replied by his letter dated 9th December 1966 that final orders will be issued on receipt of orders from the Executive Engineer, Sivaganga, and the Collector of Ramanathapuram District. Subsequently, the Petitioner received a communication dated 29th December 1969 from the Panchayat Union Commissioner requesting for some records which were thereafter furnished by the Petitioner. In the meanwhile, some complaints appear to have been received by the Government about the work carried out by the Panchayat. The Government order dated 4th September 1971 was communicated to the Petitioner subsequent to 8th October 1971. That order is to the effect that no payment need be made to the contractor in view of the letter of the Director of Rural Development that no payment need be made to the contractor until a decision is taken on the legal action proposed and the result of such action is known. But, the work in the present case was done by the Panchayat itself in view of the Panchayat Union Commissioner''s instruction. The Petitioner wrote to the Government for reimbursement of the sum of Rs. 4,400. The Panchayat Union Commissioner invoked the power of surcharge on 30th September 1974. On 26th October 1974, the Petitioner replied saying that the amount was claimed from the Government and explained about the position. On 18th January 1975, the order of surcharge to the entire extant of Rs. 4,400, was issued by the Divisional Development Officer, the second Respondent. The Petitioner replied on 24th January, 1975 saying that the amount had been claimed from the Government and that the Petitioner is personally not liable to make good the amount. The Panchayat Union Commissioner held as enquiry with notice to the Petitioner and recommended on 26th April 1975 that the Collector should make good the amount to the Panchayat. Subsequently, the impugned order has been passed by the first Respondent on 26th September 1975. In the affidavit filed in support of the writ petition, it is urged that the surcharge order and the impugned proceedings of the Collector are void.

3. In the counter-affidavit filed on behalf of the Respondent it is contended that it was found out that in respect of the work carried out in Veppenkulam tank, the Panchayat had lost a sum of Rs. 4,400, and that the Petitioner had been responsible for the same. The Divisional Development Officer, the auditor of the Panchayat, called upon the Petitioner on 13th September, 1974 to remit the amount immediately. The Petitioner made a representation on 26th October, 1974. Orders were however passed by the second Respondent, the Divisional Development Officer, Ramanathapuram Division, on 18th January, 1975 surcharging the Petitioner for the entire sum of Rs. 4,400, The Petitioner preferred a petition on 24th January 1975, but the first Respondent passed the impugned order on 26th Decemberl975 holding the Petitioner responsible for the loss of Rs. 4,400, sustained by the Panchayat due to his negligence. The surcharge certificate was issued only after the issue of a preliminary notice dated 30th September 1974 to the Petitioner. As per the Government Memo No. 120805/C-1972/7, R.D. & L.A., Department dated 5th July 1973 if certain disqualification is incurred the Collector is the authority competent to take action. The issue of notice is not contemplated and it is enough, if the member is informed in writing about the disqualification. The Petitioner had drawn. Rs. 4,400, for execution of the Rural Man Power Work. The advance had to be adjusted by getting reimbursement from the Government funds by the Panchayat Union. The Petitioner as the President of the Panchayat had failed to get reimbursement. Therefore, the surcharge order was passed. Though the subject matter related to the period from April, 1963 to March 1964, it is not subject to the limitation of three years prescribed in Section 173 of the Tamil Nadu Panchayat Act 1958 for institution of suits. The payment has no doubt been recommended by the Divisional Development Officer. But he is not the final authority to sanction the amount. The Petitioner''s appeal to the Government against the surcharge order was dismissed in G.O. Ms. No. 505, R.D. & L.A., Department dated 22nd March 1976 on the ground that the appeal had not been preferred in time. The Respondents thus contend that the writ petition is liable to be dismissed.

4. Section 28 of the Tamil Nadu Panchayat Act 1958 prescribed the authority to decide questions of disqualification of members and reads:

28. Authority to decide questions of disqualifications of members--(i) whenever it is alleged that any person, who has been elected as a member of a panchayat or, who becomes a member of a panchayat union council is not qualified or has become disqualified under Sections 22, 24, 25, 26 or 27-A, the executive authority or the commissioner as the case may be, shall, by notice in writing inform such member of the allegation and place the matter at the next meeting of the panchayat or panchayat union council. If before the date of the expiry of

two months from the date of receipt of such notice such member does not apply to the prescribed judicial authority under Sub-section (2), he shall become not qualified or disqualified from such date of expiry of the said two months.

(ii) The executive authority or the commissioner, as the case may be, if so directed by the panchayat or panchayat union council or by the Inspector, shall, and any such member or any other member may, apply to the prescribed judicial authority whose decision on such allegation shall be final.

(iii) Where an application has been made under Sub-section (2), the member shall, pending decision on such application, be entitled to act as, if he is qualified or were not disqualified, and

(iv) Nothing contained in this section shall be deemed to affect the provisions of Section 27.

5. The rules relating to Surcharge and Disallowance made in exercise of the powers conferred by Clause (xvi-a) of Sub-section (2) of Section 178 of the Tamil Nadu Panchayats Act 1958 came into force on 2nd September, 1964. Under Rule 1 of those rules, the Commissioner of a Panchayat Union Council or the Executive Authority of a Panchayat should submit all accounts to auditors appointed u/s 141 of the Act, as required by the auditors. There is no dispute that the Divisional Development Officer is the auditor in this case. There is also no dispute that A. Punavasal Panchayat is a village Panchayat. u/s 2(10) of the Tamil Nadu Panchayats Act, the Executvie Authority in the case of a village panchayat is the president of that Panchayat. Therefore, under Rule 1 of the said rules read with Section 2(10) of the Tamil Nadu Panchayat Act, the Petitioner as the president of A. punavasal panchayat was bound to submit all accounts relating to that Panchayat to the auditors appointed under the Act.

Under Rule 5(1) the auditor empowered by the Government, may disallow every item which is contrary to law and surcharge the same on the person making or authorities of the illegal payments and may charge against any person responsible there for the amount of any deficiency, loss or unprofitable outlay incurred by the negligence or misconduct of that person or of any sum, which ought to have been but is not brought to account by that person and shall, in every such case, certify the amount due from such person.

6. The submission of the learned Counsel for the writ Petitioner is that the Divisional Officer had no right to issue the surcharge memo, dated 18th January, 1975 in respect of matters which had taken place prior to 2nd September 1964, the date on which the Surcharge and Disallowance Rules came into force. He also submitted that the Petitioner''s case does not fall within Rule 5(1) of the Surcharge and Disallowance Rules on the ground that that rule provides for surcharging on the person making or authorising the making of illegal payments and for charging against any person responsible therefore the amount of any deficiency, loss or unprofitable outlay incurred by the negligence or misconduct of that person or of any sum which ought to have been but is not brought to

account by that person. The submission is that the Petitioner has not made or authorised the making of any illegal payment and had not been responsible for any loss or up profitable outlay incurred by his negligence or misconduct, and has not failed to bring any sum to account. The complaint against the Petitioner is that he had not obtained reimbursement of the amount from the Government. There is, however, no substance in that complaint, having regard to the fact that the Divisional Development Officer himself has by his order dated 26th April 1975 recommended payment of the amount to the Panchayat. It was not contended on behalf of the Respondents that there was any negligence or misconduct on the part of the Petitioner or that any loss had been caused by him to the Panchayat on account of any negligence on his part. Nor was it disputed that the Divisional Development Officer had by his letter dated 26th April, 1975 recommended payment of the sum of Rs. 4,400 by the Collector to the Panchayat. It is also contended on behalf of the Petitioner that by the Divisional Development Officer''s recommendation dated 26th April 1975, the surcharge order dated 18th January 1975 should be deemed to have been waived. In the circumstances of this case, I agree with the learned Counsel for the Petitioner that the Petitioner''s case does not come within the purview of Rule 5(1) of the Surcharge and Disallowance Rules and that the surcharge order dated 18th January 1975 has to be deemed to have been waived by reason of the Divisional Development Officer''s letter dated 26th April 1975 recommending payment of the sum of Rs. 4,400 by the Collector to the Panchayat.

7. It was further submitted by the learned Counsel for the Petitioner that even in any loss had been caused to the Panchayat by the negligence or misconduct on the part of the President, only a suit would lie u/s 173 of the Tamil Nadu Panchayats Act. That section lays down that the President, Executive Authority and every member of a Panchayat and the Chairman, Commissioner and every member of a Panchayat Union Council, shall be liable for the loss, waste or misapplication of any money or other property owned by or vested in the Panchayat Union Council if such loss, waste or misapplication is a direct consequence of his neglect or misconduct and that a suit for compensation may be instituted against him in any court of competent jurisdiction by the Panchayat or the Panchayat Union Council with the previous sanction of the Inspector and that every such suit shall be commenced within three years after the date on which the cause of action arose. It was not contended by the learned Counsel for the Respondents that the submission made on behalf of the Petitioner that only a suit would lie against the Petitioner u/s 173 of the Tamil Nadu Panchayats Act even if any loss had been caused to the Panchayat as a direct consequence of the Petitioner''s neglect or misconduct is not correct. I find that only a suit u/s 173 of the Act could have been filed in any event, and any such suit would have been barred by limitation by the date of the surcharge order.

8. It is doubtful whether the surcharge rule which came into force on 2nd September 1964 is applicable to this item of work which was done prior to that date, namely prior to 31st March, 1964. The learned Counsel for the Petitioner

next submitted that the first Respondent as the Inspector under the Tamil Nadu Panchayats Act is not competent to declare that the Petitioner has become disqualified having regard to the provisions of Section 28 of the Act. It is only in 1970 and thereafter that the President of the Panchayat came to be elected. A person elected as a member of the village Panchayat could not become the President of the Panchayat. u/s 30(7) of the Tamil Nadu Panchayats Act, the President shall be an ex-officio member of the Panchayat and he shall have the same rights and privileges of an elected member of the Panchayat. It is not possible to hold that such member is not subject to the liabilities of any elected member of the Panchayat. Section 2(17) of the Tamil Nadu Panchayats Act defines member and says that a member means a member of a panchayat or of a panchayat union council, as the case may be, and includes a co-opted member. The Petitioner would no doubt be a member of the Panchayat for the purpose of Section 28(1) of the Act. u/s 28(1) the executive authority in the case of a Panchayat or the Commissioner in the case of a Panchayat Union should by a notice in writing inform the member of the Panchayat or the Panchayat Union Council, as the case may be, of the allegation that he is not qualified or has become disqualified under Sections 22, 24, 25, 26 or 27-A of the Act and place the matter at the next meeting of the Panchayat or Panchayat Union Council and, if before the date of expiry of two months from the date of receipt of such notice, such member does not apply to the prescribed judicial authority under Sub-section (2), he shall become not qualified or disqualified from such date of expiry of the said two months. As stated already the Petitioner as the President of the Village Panchayat is the Executive Authority and it is only the as the Executive Authority could allege that any person elected as a member of the Panchayat is not qualified or has become disqualified and inform the member by a notice in writing of the allegation and place the matter at the next meeting of the Panchayat. The Petitioner could not be expected to take any such action against himself in the present case There is no provision in the Act as to what is to be done if the allegation is against the Executive Authority of the Village Panchayat and the elected President of the Panchayat as the Executive Authority does not issue any notice in writing of the allegation and place the matter before the next meeting of the Panchayats.

9. No doubt u/s 198 of the Tamil Nadu Panchayats Act, power has been given to remove difficulties. That section lays down that if any difficulty arises in first giving effect to the provisions of this Act, or as to the first constitution or reconstitution of any panchayat or panchayat union council after the commencement of this Act, the Government has occasion may require, may by order, do anything which appears to them necessary for the purpose of removing the difficulty. The Government have exercised this power by issuing a memo No. 129805 C1/72-7 R.D. & L.A., Department, dated 5th July 1973. But that memo relates to some other party and not the Petitioner. There is nothing on record to show that the Government had in exercise of the powers conferred u/s 198 of the Tamil Nadu Panchayats Act, constituted the first Respondent as the person

competent to make allegation against the Petitioner and give him notice in writing of the same and place the matter at the next meeting of the Panchayat as per the provisions of Section 28(1) of the Act. In these circumstances I hold that the impugned order is not consistent with Section 28(1) of the Act and, therefore void.

10. It was contended on behalf of the Respondents that the surcharge order had become final on the ground that the Petitioner filed an appeal to the Government not only against the surcharge order, but also against the order impugned in the present writ petition and that the appeal was dismissed by the Government on 26th March, 1976. Under Rule 6(1) any person aggrieved by dis-allowance, surcharge or charge made, within fourteen days after he has received or been served with the decision of the auditor, either apply to the Principal Civil Court of Original Jurisdiction to set aside such dis-allowance, surcharge or charge or in lieu of such application, appeal to the Government and any order passed on such appeal by the Government shall be final. The Civil Court moved under Rule 6(1)(a), after taking such evidence as is necessary, may confirm, modify or remit such disallowance, surcharge or charge with such orders as to costs as it may think proper in the circumstances. Under Sub-rule (2) of Rule 6, from any decision of the court under Clause (a) of Sub-rule (1), an appeal shall lie to the High Court. u/s 158 of the Tamil Nadu Panchayats Act, the Government may, in their discretion after consulting the Inspector, Collector or such other officer or authority as they may deem fit, at any time, either suo motu or an application, call for and examine the record of any order passed or proceeding recorded under the provisions of that Act by the Inspector or the Collector or any officer authorised by the Inspector or the Collector under Sub-section (2) or (3) of Section 157, or any officer authorised by the Government under Sub-section (1) of that section or any officer empowered by them under Sub-section (4) of that section, or any other authority or officer, for the purpose of satisfying themselves as to the legality or propriety of such order, or as to the regularity of such proceeding and pass such order in reference thereto as they think fit. The Petitioner had filed revision petition No. 12 of 1976 before the Government praying for quasing not only the surcharge proceedings, dated 18th January, 1975, but also the impugned order, dated 26th December, 1975 in that petition. The Government appear to have treated that petition as an appeal under Rule 6(1)(b) of the Surcharge and Disallowance Rules and had issued G.O. Ms. No. 505, R.D. L.A., Department, dated 22nd March, 1976. In that G.O. it is stated that according to Rule 6 of the Surcharge and Disallowance Rules, an appeal should be filed before the Government within fourteen days from the date of the receipt of the surcharge certificate, that the Petitioners appeal is belated, that the Government examined the question, whether there is any justification to admit the belated appeal and have decided not to admit the appeal and that the appeal filed by the Petitioner against the surcharge certificate issued on him is accordingly dismissed as time barred. No appeal as such under Rule 6(1)(b) of the Surcharge and Disallowance Rules had been filed and no order on merits on

any such appeal had been passed by the Government. There is also no question of the surcharge order having become final, for, as already stated, it has not been passed in respect of anything falling within Rule 5(1) of the Surcharge and Disallowance Rules. Therefore, there is no bar of Rule 6(1)(b) in this case.

11. It was contended on behalf of the Respondents that it was open to the Petitioner to question even the validity of the impugned order by applying to the prescribed judicial authority as provided for in Section 28(1) of the Tamil Nadu Panchayats Act. But it is submitted on behalf of the Petitioner that the impugned order is not a valid order, but is a void one on the ground that the Collector was not competent to pass the same and, therefore, the Petitioner is not obliged to apply to the prescribed judicial authority as provided for in Section 28(1) of the Act. This submission is well-founded. It was next submitted on behalf of the Respondents that since reference is made in Section 28(2) to the Inspector, it must imply that the Inspector is competent to take action u/s 28(1) of the Act. u/s 28(1) it is only the Executive Authority of a Panchayat or the Commissioner of the Panchayat Union Council, as the case may be, that is entitled by a notice in writing to inform any member, who has been elected as a member of the Panchayat or, who becomes a member of the Panchayat Union Council that he is not qualified or has become disqualified under Sections 22, 24, 25, 26 or 27-A. There is no reference to the Inspector in that Sub-section. Only under Sub-section (2) of Section 28, the Executive Authority or the Commissioner, as the case may be, if so directed by the Panchayat or Panchayat Union Council or by the Inspector, is bound to apply to the prescribed judicial authority about the allegations. From the mere fact that Inspector may direct the executive authority or the Commissioner as the case may be to apply to the prescribed judicial authority, it is not possible to hold that the Inspector himself without any direction by the Government u/s 198 of the Act, nay inform the President of the Panchayat in writing of the allegation that he is not qualified or has become disqualified and place the matter at the next meeting of the Panchayat u/s 28(1) of the Act. Therefore it is not possible to agree with the learned Counsel for the Respondents that the Inspector himself is competent to take action without reference to any order from the Government u/s 198 of the Act to take action u/s 28(1) of the Act.

12. For the reasons stated above, I find that the surcharge order itself is not valid as it has not been issued in respect of any matter felling within Rule 5(1) of the Surcharge and Disallowance Rules which came into force on 2nd September 1964 and that the impugned order of the first Respondent is not in accordance Section 28(1) of the Tamil Nadu Panchayats Act, 1958 and is with therefore liable to be quashed. The writ petition is accordingly allowed with costs.