State Govt Well Equipped To Decide Legality Of Panchayat Decisions, S.191 Kerala Panchayat Raj Act Is An Efficacious Alternate Remedy: High Court

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
MURALI PURUSHOTHAMAN; J.
WP(C) NO. 4367 OF 2022; 29 November 2022
DR. V.V. HARIDAS MD *versus* **STATE OF KERALA**

Petitioner by Advs. Anil S. Raj, K.N. Rajani, Radhika Rajasekharan P., Anila Peter, Muhammed Haris K.K., Simi S. Ali.

Respondents Sr. Government Pleader Surya Binoy, J. Omprakash, SC, Cherthala Municipality, Darsan Somanath, SC for R3, T. Naveen Kumar – SC for R4

J U D G M E N T

Since Common issues arise for consideration in these writ petitions, they were heard together and are disposed of by this common judgment. The respondents and the status in which they are arrayed in both writ petitions are the same and the exhibits referred to hereinbelow shall be as obtaining in W.P.(C) No.4367/2022.

2. The petitioner in W.P. (C). No. 24389 of 2021 is a Company which is engaged in the business of running hospitals and has a 63 bed hospital at Thaneermukkam Grama Panchayat, the 3rd respondent (hereinafter referred to as the 'Panchayat'). The petitioner is aggrieved by Ext. P3 resolution dated 28.09.2021 of the Panchayat permitting the setting up of a Fecal Sludge Treatment Plant (FSTP) by the 2nd respondent, the Cherthala Municipality ('Municipality' for short), in the puramboke property vested in the Panchayat and lying adjacent to the premises of the petitioner. According to the petitioner, the land where the FSTP is proposed to be set up is a community property vested in the Panchayat and can be used only for the benefit of the villagers as specified in Section 171 of the Kerala Panchayat Raj Act, 1994 (hereinafter referred to as 'K P R Act' for short), and not for the use of the residents of the Municipality. The petitioner contends that, the decision of the Panchayat to set up the FSTP is vitiated by political reasons and is against the norms of the Kerala State Pollution Control Board, the 4th respondent.

3. The petitioner in W.P. (C). No. 4367 of 2022 is the Director and Chief Medical Officer of K.V.M. Hospital, Cherthala and is aggrieved by the proposal to set up the aforesaid FSTP in the community property vested in the Panchayat and lying adjacent to his premises. According to the petitioner, the distance between the proposed FSTP and his hospital is only 34 meters and the same violates the conditions prescribed by the Pollution Control Board in Ext. P3 'consent to establish' the plant and that there is no proper and scientific procedure for handling the treated water and slurry. The petitioner, therefore, seeks for a direction to quash Ext. P1 resolution of the Panchayat (Ext. P3 in W.P. (C). No. 24389 of 2021) and Ext. P3 'consent to establish' the plant issued by the Pollution Control Board.

4. On 07.04.2022, this Court passed a common order inthe writ petitions as hereunder:-

"The grievance in both these writ petitions is with respect to the proposal to install a FSTP of point 0.25 MLD capacity adjacent to the property of the petitioner. The learned standing counsel for the Municipality submits that the process of tendering the work is going on and technical bid alone has been opened. Since the petitioners are not challenging the tender process, this Court will not

be justified in interfering with the same. However, no work shall be started with regard to the said project without obtaining orders from this Court.

Respondents may place their counter affidavits on record."

The respondents 1 to 3 have, accordingly, placed their counter affidavits on record and the Kerala State Pollution Control Board has filed a report in W.P. (C). No. 24389 of 2021. The respondents 1 to 3 have taken a contention that the writ petitions are not maintainable in view of the alternate remedy available to the petitioners under Section 191 of the K P R Act.

5. The petitioners have also filed their reply affidavits.

6. Heard Smt. Radhika Rajasekharan, the learned counsel for the petitioners, Smt. Surya Binoy, the learned Senior Government Pleader, Sri. J. Omprakash, the learned counsel for the Municipality, Sri. Darsan Somanath, the learned counsel for the Panchayat and Sri. T. Naveen, the learned standing counsel for the Kerala State Pollution Control Board.

7. It is trite that when the question of maintainability of a writ petition is raised, the said issue has to be considered first before sallying forth into a discussion and decision on the merits. Accordingly, the counsel were heard on the question of maintainability of the writ petitions.

8. According to Sri. J. Omprakash, Ext. P1 is a resolution of the Panchayat permitting setting up of the FSTP of the Municipality in the property of the Panchayat against which the petitioners have effective alternate remedy under Section 191 of the K P R Act. It is further contended that, Ext. P3 'consent to establish' issued under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 and Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 is appealable under Sections 28 and 31 of the respective Acts. Smt. Surya, apart from supporting the contentions of Sri. J. Omprakash, would argue that, disputed questions of fact are involved in the writ petitions which cannot be agitated before this Court in proceedings under Article 226 of the Constitution of India. Sri. Darsan supports the said contentions and Sri. Naveen would submit that, against the 'consent to establish' the FSTP issued by the Pollution Control Board, the petitioners have statutory appellate remedy. Smt. Radhika would contend that Section 191 of the K P R Act is not an efficacious alternate remedy since it is the functionaries of the Government which have taken the initiative to secure FSTP. Relying on the decision of the Division Bench of this Court in **Harrisons Malayalam Limited and another *v.* State of Kerala and others** [2018 (2) KHC 719: 2018 (2) KLT 369], Smt. Radhika would submit that approaching the Government would be a futile exercise akin to an appeal from "Caesar to Caesar's wife". The decision of the Hon'ble Supreme Court in **Magadh Sugar and Energy Ltd *v.* State of Bihar and others** [2021 KHC 6513:2021 (5) KLT 667] was also relied on by Smt. Radhika to contend that it is futile to relegate parties to a remedy which is patently vain and futile.

9. In **M/s Radha Krishan Industries *v* State of Himachal Pradesh & Ors** [(2021) 6 SCC 771], the Hon'ble Supreme Court, after referring to the decisions in **Whirlpool Corporation *v* Registrar of Trademarks, Mumbai** [(1998) 8 SCC 1] and **Harbanslal Sahnia *v* Indian Oil Corpn. Ltd** [(2003) 2 SCC 107], has carved out the following principles governing the exercise of writ jurisdiction by the High Court in presence of an alternate remedy. The Court observed as under;

"27. The principles of law which emerge are that:

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where(a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the HighCourt of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

Referring to the aforesaid decisions and reiterating the aforesaid principles, the Hon'ble Supreme Court in **Magadh Sugar and Energy Ltd** (supra), held that, while a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in the aforesaid contingencies.

10. In the light of the above principles laid down by the Hon'ble Supreme Court, this Court has to examine whether an effective efficacious alternate remedy is available to the petitioners and if such a remedy is available, whether they have made out any exceptional grounds to disregard the alternate remedy and to invoke the extraordinary original jurisdiction under Article 226 of the Constitution of India.

11. It is contended by the respondents that the petitioners have an efficacious alternate remedy under Section 191 of the K P R Act against the resolution of the Panchayat permitting the setting up of a FSTP by the Municipality. In the light of the said contention, this Court has to examine whether Section 191 of the K P R Act provides for an efficacious statutory alternate remedy for the petitioners to challenge the resolution of the Panchayat which is impugned in the writ petitions. Section 191 of the K P R Act reads as under:

191. Power of cancellation and suspension of resolutions etc.-

1. Governmen t may either suo moto or, on a reference by President, Secretary or a member, or on a petition received from a citizen, cancel or very a resolution passed or a decision taken by the panchayat if in their opinion such decision or resolution –

a. is not legally passed or taken ; or

b. is in excess of the powers conferred by this Act or any other law or its abuse; or

c. is likely to endanger human life, health public safety, communal harmony or may lead to riot or quarrel; or

d. is in violation of the directions or provisions of grant issued by Government in the matter of implementing the plans, schemes or programmes.

2. Before cancelling or amending a resolution or decision as per subsection (1), the Government may refer the matter for consideration either of the ombudsman constituted under section 271 G or the tribunal constituted under section 271S and the ombudsman or the tribunal, as the case may be; after giving the panchayat an opportunity of being head, send a report to the Government with its conclusions and the Government may, on its basis cancel, amend or confirm the resolution or decision.

3. If another remedy is available to the petitioner through the tribunal under section 276, the Government shall not consider any petition for cancelling or amending any resolution or decision of the Panchayat.

4. If Government consider that a resolution or decision of the Panchayat has to be cancelled or amended as per sub-section (1) it may suspend such resolution or decision temporarily and may direct the panchayat to defer its implementation till the final disposal after the completion of the procedure under sub-section (2).

(*emphasis supplied*)

12. Section 191 of the KPR Act thus empowers the Government either *suo motu* or on a reference by the president, secretary or a member or on a petition received from a citizen, to cancel or vary a resolution passed or decision taken by the panchayat if in their opinion such decision or resolution is not legally passed or taken or is in excess of the powers conferred by the KPR Act or any other law or its abuse or is likely to endanger human life, health, public safety, communal harmony or may lead to riot or quarrel or is in violation of the directions or provisions of grant issued by the Government in the matter of implementing the plans, schemes or programmes. The Section also provides that, before cancelling or amending a resolution or decision as per sub section (1), the Government may refer the matter for consideration of the Ombudsman for Local Self Government Institutions ('Ombudsman' for short) or the Tribunal for Local Self Government Institutions ('Tribunal' for short), as the case may be, after giving the panchayat an opportunity of being heard. The Section also empowers the Government to suspend such resolution or decision temporarily and may direct the panchayat to defer its implementation till the final disposal after the completion of the procedure under sub section (2). Thus, the Government is well equipped to decide the legality of any resolution passed or decision taken by the panchayat and have powers to suspend such resolution or decision temporarily till the final disposal of the reference or petition under Section 191(1). Therefore, Section 191 provides for an efficacious, alternate statutory remedy against resolutions or decisions taken by the panchayat.

13. In **Marykutty George *v.* State of Kerala** [2005 (2) KLT 515:2005 KHC 688], this Court considered the scope of Section 191 of the K P R Act and held that the Government, under Section 191, is empowered to cancel a decision taken by the panchayat which is not legally passed or taken in excess of the powers conferred by the Act or any other law or its abuse, as the case may be and a petition preferred against the resolution before the Government is maintainable. In **Vanaraj *v.* Santhanpara Grama Panchayat, Idukki and others** [2014 (1) KHC 766:2014(1) KLT 1065], this Court held that a writ petition is not maintainable against the resolution of the panchayat committee and the remedy is to challenge the resolution by a reference to the Government in terms of Section 191(1). The said decision has been confirmed by the Division Bench in **Vanaraj *v.* Santhanpara Grama Panchayat, Idukki and others** [2014 (2) KHC 674:2014(2) KLT 958]. The powers of the Government under Section 191 were also considered by this Court in **Ayisha K. V**

and others *v*. State of Kerala and others [2015 (4) KHC 296 :2015 (3) KLT SN 113] and this Court held that under Section 191, the Government exercises its supervisory or corrective powers in terms of the policy decisions of the panchayat and it is not adversarial in nature. In **Malathi Prabhakaran and ors. *v*. Ombudsman for Local Self Government Institutions and ors.** [2021 KHC 800:2022 (1) KLJ 34], this Court held that, against a resolution passed by the panchayat which is illegal, the officer of the panchayat, any member of the panchayat or any third person can file suitable application before the Government under Section 191 for cancellation of the resolution.

14. Section 276 of the K P R Act deals with the hierarchical statutory remedies of appeal and revision. Section 276 provides for appeal to the committee of the Panchayat or appeal or revision to the Tribunal for Local Self Government Institutions as the case may be. An appeal shall lie to the Panchayat against the notice, order or action of the President or Secretary in exercise of the powers conferred by the K P R Act, Rules, Byelaws or Regulations made thereunder except Sections 235 I, 235 J, 235 N, 235 W and 235 X. An appellate remedy to Tribunal is provided on the notice, order or action of the Secretary under sections 235 I, 235 J, 235 N, 235 W and 235 X. Sub-section (5) of Section 276 provides for appeal to the Tribunal on any notice issued, order passed, or action taken by the Panchayat and a revision to the Tribunal on a 'decision' taken by the Panchayat committee or standing committee on any appeal, on specified subjects. Though the statutory appeal under sub-section (5) of Section 276 covers a 'decision' taken by the Panchayat committee on any appeal on specified subjects, it does not cover a 'resolution' of the Panchayat committee. While Section 276 of the K P R Act provides for hierarchical statutory remedies of appeal and revision, Section 191 provides for statutory remedy against 'resolutions' and 'decisions taken by the panchayat, where no remedy is available before the Tribunal'.

15. Section 191 of the K P R Act is akin to Rule 176 of the Kerala Co-operative Societies Rules, 1969 which deals with the powers of the Joint Registrar to rescind any resolution of any meeting of any society if it appears to him that such resolution is *ultra vires* of the objects of the Society, or is against the provisions of the Act, Rules, Bye-laws or of any directions or instructions issued by the Department, or calculated to disturb the peaceful and orderly working of the Society or is contrary to the better interest of the Society. The word 'rescind' denotes, to cancel, revoke, repeal or annul. While the power to rescind the resolution of any meeting of any Co-operative Society is prescribed in the Rules, the power to rescind the resolution passed or decision taken by the Panchayat is provided in the primary legislation itself. Interpreting Rule 176 of the Kerala Co-operative Societies Rules, the Division Bench of this Court in **President, Peechi Service Co-operative Bank, Thrissur and anr. *v*. Tessy Varghese and ors.**[2015 (4) KLT 919: 2015 KHC 829], has held that, Rule 176 which provides for power to the Registrar to rescind a resolution of the Co-operative Society or the committee of the Society is a statutory remedy. The powers of the Government under Section 191 of the K P R Act are wider than the powers of the Registrar to rescind a resolution available under Rule 176 of the Kerala Co-operative Societies Rules and sub-section (2) of Section 191 provides that, before cancelling or amending a resolution as per subsection (1), the Government may refer the matter for consideration either of the Ombudsman or the Tribunal as the case may be. Thus, there is inbuilt mechanism under the Section to prevent any arbitrary action on the part of the Government and the Government is well equipped to decide the legality of any resolution passed or decision taken by the Panchayat. The power conferred on the Government under Section 191 of the K P R Act is quasi judicial and any administrative decision of the

functionaries of the Government cannot preclude the Government from exercising its quasi judicial functions. Therefore, the contention of Smt. Radhika that the remedy before the Government would be vain and futile must fail.

The grievance of the petitioners in the writ petitions is against the resolution of the Panchayat to set up FSTP of the Municipality in the Panchayat adjacent to their property. The petitioners have statutory remedy against the resolution under Section 191. When the Act creates a statutory forum for redressal of grievance, this Court will not entertain the writ petition ignoring the statutory dispensation. The distance and siting of the FSTP from the buildings as per norms for Sewage Treatment plant, quantity of sludge generated, beneficiaries of the FSTP, parking requirements, whether the land where the FSTP is proposed is a community property vested in the Panchayat or belongs to the Municipality, the measures proposed to ensure health, public safety and other issues raised in the writ petitions can be determined only with reference to the factual scenario. No exceptional circumstances have been urged in the writ petitions to invoke the extraordinary original jurisdiction of this Court under Article 226 ignoring the statutory alternate remedy. Therefore, without prejudice to the right of the petitioners to avail the alternate remedy under Section 191 of the K P R Act, these writ petitions are dismissed. However, to enable the petitioners to avail the remedy before the Government, further proceedings pursuant to Ext. P1 resolution to install the FSTP shall be deferred for a period of two weeks. It is made clear that this Court has considered only the question of maintainability of the writ petitions before this Court and has not expressed any opinion on the merits of the writ petitions. There will be no order as to costs.