IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

Crl.Rev.Pet.No. 1595 of 2003 ( )

AGAINST THE JUDGMENT IN CRA 281/2001 of ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC-I), THODUPUZHA DATED 05-04-2003

AGAINST THE JUDGMENT IN ST 623/1994 of JUDICIAL MAGISTRATE OF FIRST CLASS II,THODUPUZHA

REVISION PETITIONER/APPELLANT/ACCUSED:

P.A.ABDULKHADEER, POTHIYIL HOUSE
KARAKULAM, VILANGU P.O,
KIZHAKKAMBALAM.
NOW RESIDING AT POTHIYIL HOUSE
OLAMATTAM, THODUPUZHA.

BY ADV. SRI.K.GOPALAKRISHNA KURUP

RESPONDENT/RESPONDENT/COMPLAINANT AND STATE:

1. EXECUTIVE OFFICER (M.A.MATHEW)
   KODIKULAM PANCHAYAT
   KODIKULAM P.O.

2. STATE OF KERALA
   REP, BY PUBLIC PROSECUTOR
   HIGH COURT OF KERALA
   ERNAKULAM.

BY ADV. PUBLIC PROSECUTOR SMT SAREENA GEORGE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 18-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.D.RAJAN, J

....

Crl.R.P.No.1595 of 2003

....

Dated 18th August, 2015

ORDER 'CR'

The revision petitioner, who is the appellant in Crl.A.281 of 2001 on the file of the Additional Sessions Judge, Thodupuzha challenges the judgment of conviction under Section 74 of the Kerala Panchayat Act 1960 (hereinafter referred to as the ' Act') read with rule 26 of the Panchayat Taxation and Appeal Rules 1963 (hereinafter referred to as the 'Rules'). He was convicted by the Judicial First Class Magistrate-II, Thodupuzha in S.T.623 of 1994 and sentenced to fine of Rs.1000/- and in default simple imprisonment for one month and also directed to pay arrears of Rs.41,065/- to the panchayat within 30 days from the date of the order.

2. The brief facts necessary for indictment were that on 30.3.1994 Executing Officer, Kodikulam Panchayat auctioned the river sand from Vandamattomthodu and Vallakkadavu and the revision petitioner was the bidder for Rs.24,000/- and for Rs.12,075/- but he failed to pay a sum of Rs.41,065/- to the panchayat. On 17.12.1993, Executive Officer, Kodikulam panchayat issued a demand notice and directed the revision petitioner to remit the amount within 15 days. When there

was no payment, he issued revenue recovery notice for recovering the amount and issued distraint warrant. Since the revision petitioner has no movable or immovable properties within the limits of the panchayat, the same could not be executed. In the circumstances, he prosecuted the revision petitioner under Section 74 of Kerala Panchayat Act, 1960.

3. In the trial court, complainant was examined PW1 and his documents were marked Ext.P1 to P8. Ext.B1 was marked from the side of the revision petitioner. Trial court after considering the evidence, convicted the accused against that conviction, he preferred Crl.A.281 of 2001, where the revision petitioner was released under Section 3 of the Probation of Offenders Act and also directed to pay a compensation of Rs.41,065/- to the panchayat under Section 5 of the Probation of Offender's Act.

4. Learned counsel appearing for the revision petitioner contended that a prosecution under Section 74 of the Panchayat Act is not maintainable for realizing a liability created in a contract. The revision petitioner was a bidder for mining of sand from Vandamattomthodu. Therefore such amount can be realised only through a civil proceeding. Any

arrears of cess, rate, surcharge or tax imposed or fee levied under the Act alone shall be recoverable as arrears of public revenue for which a prosecution is maintainable but when a liability under a contract arises, a prosecution is not possible. The illegality committed by the courts below is to be rectified by invoking the revisional jurisdiction.

5. It is the duty of the revisional court to correct the failure of justice arising from the erroneous orders, such as misconception of law or facts, irregularity of procedure, misreading of evidence etc. While invoking revisional jurisdiction to rectify such patent defect or an error it is true that there is no vested right of revision in the sense, when there is vested right in appeal, and it is purely discretionary. In an appeal, the appellant is given a statutory right to demand adjudication upon a question of law or question of fact or of both. But in a revisional jurisdiction, the appellant has no such right, it is for the court to interfere in exceptional cases when it is seen that some real and substantial injustice has been done.

6. For ascertaining the illegality or irregularity, I have considered Section 74 of the Kerala Panchayat Act, 1960 which

reads as follows.

> " 74. Recovery of arrears of tax, cess etc - Any arrear of cess, rate, surcharge or tax imposed or fees levied under this Act shall be recoverable as an arrear of public revenue under the law relating to the recovery of arrears of public revenue for the time being in force:
>
> Provided that the executive authority may directly recovery by distraint, under his warrant, and sale of movable properties of the defaulter subject to such rules as may be prescribed:
>
> Provided further that, if for any reason the distraint or a sufficient distraint of the defaulter's property is impracticable, the executive authority may prosecute the defaulters before a Magistrate".

7. The same principles have been incorporated under Section 210 of the Kerala Panchayat Raj Act 1994. A close scrutiny of Section 74 of the Panchayat Act 1960 clearly shows that the arrears of cess, rate, surcharge or tax imposed or fee levied under the Kerala Panchayat Act alone shall be recoverable as arrears of public revenue relating to recovery of public revenue for the time being in force. The executive authority has given power to recover the amount by distraint warrant by sale of movable properties of the defaulter. When

it is difficult to realise the amount through distraint warrant, the executing authority shall prosecute the defaulter before a Magistrate. Therefore, it is crystal clear about the method by which and the manner in which the executing authorities can prosecute a defaulter for payment of any arrears of cess, rate or surcharge, tax or fee under the Act.

8. The specific case of the first respondent was that during the financial year, he was a bidder for sand mining in two places in the Kodikulam panchayat. The amount due under two agreements are Rs.36074/-, interest at Rs.4982/- notice fee Rs.8/-, warrant fee 50 paise and total Rs.41065.50. The question now arises for consideration is whether the liability under a contract is enforceable by invoking Section 74 of the Act. As already mentioned above, under S.129, the Act does not envisage prosecution for default of bid amount. Therefore, the general rule making power under S.254 does not enable to provide for prosecution to recover the amount arising from a contract.

9. While discussing Section 210 of the Kerala Panchayat Raj Act 1994, this court in **Thalavoor Grama Panchayat V. Salim** (2004(3) KLT 835) held as follows.

" The auction amount is not specifically made mention of in the said notification. It will not come even under other sums due "under the Kerala Panchayat Act, 1960 or any other law or rules or bye-laws made thereunder". Admittedly by the appellant, the amount is due in terms of an agreement entered into with the accused. It is not a statutory due leviable under the Panchayat Act. Even going by the complaint itself, the amount due is out of an auction. Necessarily, it arises out of a contract. So the dues for which the prosecution is launched will not come under the purview of the said notification as well. This notification issued in terms of the Panchayat Act, 1960 cannot be said to be saved in terms of S.284(2) of the Kerala Panchayat Raj Act, 1994. This saving clause will save only those provisions in the notification or rules which are not inconsistent with the provisions of the Kerala Panchayat Raj Act, 1994. S.210 does not specifically provide prosecution for default of bid amount. Prosecution on default of bid amount, if made punishable in terms of that notification, it will be inconsistent with the Act. Rule making power is as contained in S.254 of the Panchayat Raj Act, 1994. Sub- (i) of S.254 provides that : " The Government may, by notification in the Gazette, make rules either prospectively or retrospectively to carry out all or any purposes of this Act". This is the general power. The rule made under this general power shall be for carrying out any of the purpose of the Act. As already mentioned above, under S.210, the Act does not envisage prosecution for default of bid amount. Therefore, the general rule making power under S.254 does not enable to provide for prosecution to recover bid amount. Unfortunately the counsel could not point out any item under sub-r(2) of S.254 which contains particular provision enabling the Government to prescribe rules under the new Act providing for prosecution in case of default of payment of bid amount. Only if there is such provision, the notification issued under SRO No.399 dt.13.11.1992 will be saved. Otherwise it will become inconsistent with the provisions of the Kerala Panchayat Raj Act, 1994".

10. If the revision petitioner was guilty of breach of any contract and panchayat suffered any loss, the same can be realised according to law. What was the intention of legislature at the time of enacting Section 74 of the Act is clear. When there is no express provision under Section 74 of the Act, for prosecuting a party for violation of an agreement between panchayat and a party, it is difficult to allow a

prosecution initiated by the panchayat for a broken contract. Therefore when a breach of contract is alleged, the proper remedy is to approach civil court for appropriate relief. That court will consider the agreement, the law arises for consideration, who violated the provisions of the contract, the result of the breach, the loss sustained to the panchayat and the other party. In such situation, without considering the aforesaid legal aspect, simply prosecuting the other party to a contract is not proper. Therefore the illegality committed by the courts below is to be rectified by invoking revisional jurisdiction. Hence the conviction of the revision petitioner under Section 74 of the Panchayat Act r/w Rule 26 of Kerala Panchayath Taxation and Appeal Rules 1963 is set aside and he is set at liberty. The revision petition is allowed.

P.D.RAJAN, JUDGE

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