

**Ushakumar Vs. Seetharaman**

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**Court :** Kerala

**Decided On :** Dec-10-2003

**Reported in :** 2004(1)KLT428

**Judge :** Jawahar Lal Gupta, C.J. and; A.K. Basheer, J.

**Acts :** [Kerala Panchayat Raj Act, 1994](#) - Sections 193(2), 271J, 271K, 271Q and 271Q(2); [Constitution of India](#) - Article 243B and 243K; Kerala Panchayat Raj (Conduct of Election) Rules, 1995

**Appeal No. :** O.P. No. 8334 of 2003

**Appellant :** Ushakumar

**Respondent :** Seetharaman

**Advocate for Def. :** P.B. Sahasranaman, Adv. and;Govt. Pleader

**Advocate for Pet/Ap. :** Mathew Zachariah, Adv.

**Disposition :** Petition allowed

**Judgement :**

**A.K. Basheer, J.**

1. Can the Ombudsman for Local Self Government Institutions (for short, the Ombudsman) keep a democratically elected Panchayat Committee under

suspended animation and appoint a Receiver to administer it

2. Such an extra-ordinary order passed by the Ombudsman is impugned in this Original Petition by the President of Sreemoolanagaram Grama Panchayat. Circumstances leading to the order have been stated in the Original Petition rather too elaborately. However, for the purpose of deciding the crucial question, only a brief reference to the essential facts is necessary.

3. There have been complaints galore about excavation of earth, mud, clay etc. from agricultural lands in the State. It is used for manufacture of bricks and other allied products. Various organisations comprising of agriculturists, environmentalists etc. had been clamouring for appropriate action against the so called indiscriminate excavation of earth from paddy fields and other agricultural lands. The issue was raised before this Court also by an organisation called Association for Environment Protection, Aluva, Ernakulam district. In the judgment dated October 19, 2001 in O.P.No. 34220/2000, a Division Bench of this Court had issued certain directions to the Collectors and Revenue Divisional Officers of the districts concerned 'to ensure that there is no indiscriminate digging up of paddy lands and other lands in the concerned district and ensure that directions to be issued by this Court are strictly implemented'. The following direction issued by the Division Bench is more relevant in this case.

'All the Panchayats in the State are directed not to issue any licence for manufacture or production of bricks or other articles out of mud, clay or earth unless the person who applies for licence specifies in the application the source from which he proposes to obtain clay, earth or mud. On such disclosure being made, the Panchayat will verify the lands specified and only thereafter grant licenses or permissions under the Panchayat Raj Act for starting or running any industry or manufacture or process based on clay, earth or mud and bearing in mind the relevant laws including the Kerala Land Utilisation Order.'

4. On May 15, 2002, respondent No. 1 filed a petition before the Ombudsman alleging that illegal excavation of earth was rampant in Sreemoolanagaram and Kanjoor Grama Panchayats in Aluva Village of Ernakulam District. It was alleged that the illegal activity was being permitted by the authorities of the two Grama

Panchayats in flagrant violation of the directions issued by the High Court and the Government. It was therefore prayed in the petition that appropriate action may be taken against the President and Secretary of the Grama Panchayats for issuing licence to brick manufacturers.

5. The above complaint was registered by the Ombudsman as O.P.No. 244/2002. The petitioner appeared before the Ombudsman. A counter statement dated November 30, 2001 was filed by the petitioner. It was averred that necessary steps had been taken to prevent the illegal activity. It was also stated that the revenue and forest authorities were approached for necessary assistance and help to prevent the organised illegal activity. Action was also taken against a few people who were found to have indulged in illegal excavation, According to the petitioner, only two individuals were issued licence during 2002-03 to manufacture bricks. The licences were issued after ensuring that the licensees were having sufficient stock of clay, mud, earth etc. It was further averred that unless there is effective assistance and support from the revenue and police authorities, the Panchayat may not be in a position to prevent the illegal excavation totally. Therefore the Panchayat requested the Ombudsman to issue necessary directions to the Government to take appropriate steps at the Government level. A true copy of the statement filed by the Panchayat has been placed on record as Ext.P17.

6. The Ombudsman issued a direction to the Deputy Director of Panchayats to conduct an enquiry and file a report. In his report dated January 14, 2002, the Deputy Director stated that widespread excavation activity was going on from certain lands within the limits of Sreemoolanagaram Panchayat. It was also noted by the officer that effective intervention of the Revenue and Police authorities may be necessary to stop this illegal activity which has been going on for years. The report of the Deputy Director of Panchayat is placed on record as Ext.P16.

7. The Ombudsman considered the complaint and the statement of the Panchayat as well as the report of the Deputy Director of Panchayats. The Ombudsman observed that 'In any event it is clear from the admitted facts and the aforesaid positive admission of the President, that the Panchayat is incapable of stopping the illegal acts of the manufacturers of bricks. The callous indifference shown by

the Panchayat Committee and the officials in the discharge of their legal duties, establishes beyond doubt that if the welfare of the residents of the Panchayat are left in their hands, the residents will suffer irreparable injury and damages. This shall not happen in a welfare State. Neither, this shall go un-noticed..'

8. It was in the above circumstances that the impugned order was issued by the Ombudsman on February 28, 2003. The relevant portion of the order is extracted hereunder:

'In the above circumstances, in exercise of the authority conferred on the Ombudsman under Section 271Q(1)(v), as a remedial measure I appoint the Deputy Director of Panchayat as Receiver to administer the Panchayat, until such time the Government acts upon the suggestions, I propose to give under Section 271Q(2). During the interregnum the elected body will remain under suspended animation. The Panchayat shall put the Receiver in charge of the administration within 2 weeks from today. Failure to comply with this direction will result in the initiation of penal proceedings against those elected representatives, who stand in the way of the Receiver assuming administration. If found necessary, the Government shall render assistance to the Receiver to assume administration of the Panchayat.'

9. The short question is whether the Ombudsman appointed under the [Kerala Panchayat Raj Act, 1994](#) (for short, the Act) is invested with any statutory power, authority or jurisdiction to issue such an order.

10. To consider the above question, a brief reference to the history and concept of 'Ombudsman' and its incorporation in the Act may be pertinent. Ombudsman is a Scandinavian word meaning 'Officer' or 'Commissioner', who has the duty to investigate and report to Parliament on citizens' complaints against the Government. Under the Treaty of Maastricht, complaints were made directly to the Ombudsmen. In its strict sense, an Ombudsman was not required to possess any legal powers of enquiry. Ombudsman was not treated as a court of appeal and he could not alter or reverse any Government decision. It derived effectiveness entirely from the power to focus public and parliamentary attention upon citizens' grievances. If that complaint was found to be justified, an Ombudsman can often

persuade a government department to modify a decision.

11. Chap. XXVB of the Kerala Panchayat Raj Act deals with the constitution of Ombudsman, his term of office and conditions of service, his powers and functions, enquiry and disposal of complaints etc. In the State of Kerala, Ombudsman was constituted with effect from May 29, 2000, as provided under Section 271G of the Act. It is envisaged to be an authority 'for conducting investigations and enquiries in respect of any action involving corruption or maladministration or irregularities in the discharge of administrative functions by Local Self Government institutions or by an employee or an officer working under the Local Self Government institutions or by an employee or an officer working in any office or institution transferred to such Local Self Government institutions or by elected member of the Local Self Government institution including its President or Chair person and for the disposal of such complaints in accordance with the provision of the Act.'

12. Section 271F defines 'action', 'allegation', 'complaint', 'corruption', 'maladministration' etc. Section 271 F(1)(e) defines 'Maladministration' as hereunder:

(e) 'Maladministration' means action taken or purporting to have been taken in the exercise of administrative function in any case:-

(i) Where such action, administrative procedure or practice governing such action is unreasonable, unjust, oppressive, discriminatory or nepotistic and will make illegitimate gain or loss or will deny deserving benefits; or

(ii) Where there is wilful negligence or delay in taking such action, or the administrative procedure or method regulating such action will cause undue delay and includes the action leading to loss or waste or misuse of fund by malfeasance or misfeasance.'

'Public Servant' as defined under the above chapter means 'an employee or officer under the Local Self Government Institution or an elected member of the Local Self Government Institution including its President or Chairperson and includes an

employee or officer of any office or institution transferred to the Local Self Government Institution under the provisions of this Act.'

13. Section 271J deals with functions of the Ombudsman which include investigation into an allegation contained in a complaint or on a reference from Government or that has come to the notice of the Ombudsman. The Ombudsman is also empowered to enquire into any complaint in which corruption or maladministration of a public servant or a Local Self Government Institution is alleged. The following clause of Section 271 may be relevant for the purpose of this case:

'271J: Functions of the Ombudsman:-

(1) The Ombudsman shall perform all or any of the following functions, namely:-

(i) .....

(ii) .....

(iii) Pass an order on the allegation in the following manner, namely:-

(a) Where the irregularity involves a criminal offence committed by a public servant, the matter shall be referred to the appropriate authority for investigation.

(b) Where the irregularity causes loss or inconvenience to a citizen, direct the Local Self Government Institution to give him compensation and to reimburse the loss from the person responsible for the irregularity;

(c) Where the irregularity involves loss or waste or misuse of the fund of the Local Self Government Institution, realise such loss from those who are responsible for such irregularity and

(d) Where the irregularity is due to omission or inaction cause to supply the omission and to rectify the mistake.

(2) In addition to the functions enumerated in Sub-section (1), the Ombudsman may pass interim order restraining the Local Self Government Institution from

doing anything detrimental to the interest of the complainant if it is satisfied that much loss or injury will be caused to the complainant due to the alleged act.

(3) The Ombudsman may by order, impose penalty in addition to compensation if it is of opinion that the irregularity involves corrupt practice for personal gain.

A perusal of the above provisions contained in Chap. XXVB clearly shows that the Ombudsman is empowered to investigate into any allegation contained in a complaint or on a reference from Government or that has come to its notice. The definitions of 'action', 'allegation' and 'complaint' take within their ambit any decision, resolution etc. that may be taken or passed by the authorities of the Local Self Government Institution. The definition of public servant includes an employee or officer under the Local Self Government Institution or an elected member including the President or Chairperson of the said Institution. It is also evident that the term 'maladministration' as defined under the Act takes within its ambit any action or administrative procedure or practice which may result in denial of deserving benefits to the citizens. Maladministration also includes any wilful negligence or delay in taking action to prevent loss or waste of fund by malfeasance or misfeasance.

14. It is also pertinent to note that Section 271K enumerates the powers of Ombudsman for the purpose of any investigation or enquiry under the Act. The Ombudsman is given powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of summoning and enforcing the attendance of any witness and examining him, requisitioning any public records, or copy thereof from any court or office, etc. If the Ombudsman finds that the allegation contained in a complaint is without any substance or is trivial in nature, it may direct the complainant to pay to the opposite party a specified sum by way of cost. Similarly, if it is found that the Local Self Government Institution was guilty of causing loss or mis-utilisation of its funds, the loss can be ordered to be realised from the person responsible.

15. Section 271M provides that the Government may refer to the Ombudsman any allegation of corruption or maladministration against a Local Self Government Institution or a public servant which is within its knowledge or is brought to its

notice. The Ombudsman may, on receipt of a complaint, conduct an investigation in the matter and where there is prima facie case, it may conduct a detailed enquiry. Section 271N deals with the enquiry to be conducted by the Ombudsman after the preliminary investigation into a complaint.

16. Section 271Q deals with disposal of complaints by the Ombudsman other than those involving criminal offences.

'271Q. Disposal of complaints. -

(1) The Ombudsman may consider and dispose of complaints other than those involving criminal offences, in the following manner.-

(i) Award of compensation to a citizen in case of loss or grievance:

(ii) Order the recovery of loss caused to the Local Self Government Institution from the person responsible:

(iii) Order the supply of omission or rectification of defects due to inaction:

(iv) Order the recovery of loss from the accused failing which, order realisation through Revenue Recovery proceedings;

(v) Order other necessary remedial measures considering the facts and circumstances of the case.

(2) Where the Ombudsman finds that the procedure or practice regarding the administration of Local Self Government Institution gives room for complaint, it may give suggestions to the Government or Local Self Government Institutions relating to the measures for avoiding the recurrence of such complaint.

(3) xxxxxxxxxxxxxx

It is pertinent to note that none of the provisions to which reference has been made by us rather extensively, gives the power or authority to the Ombudsman to keep an elected Committee of the Local Self Government Institution under suspended animation. Similarly, none of the provisions under the Act empowers

the Ombudsman to appoint a receiver to administer the affairs of the local Panchayat. On the contrary, Sub-section (2) of Section 271Q clearly stipulates that the Ombudsman may give suggestions to the Government or Local Self Government Institutions relating to the measures for avoiding recurrence of any complaint, if it is found that the procedure or practice regarding the administration of the Local Self Government Institutions gives room for such complaint.

17. It is in the above statutory backdrop that the impugned order has to be considered. In the absence of any statutory power or authority, the Ombudsman cannot usurp power by which an elected Committee of a Panchayat can be kept under suspended animation. A statutory authority can wield only those powers which are vested in it by the statute. The duties and powers' of Ombudsman are clearly delineated and enumerated in the Act. The contours of power vested in the Ombudsman are vividly sharp and unambiguously explicit. In that view of the matter, we have no hesitation to hold that the impugned order is beyond the power conferred by the Statute. The Ombudsman had clearly exceeded the jurisdiction which is vested in him. At best, the Ombudsman could have given suggestion to the Government or the local body itself, if its administration was found to be unsatisfactory. Adequate measures could have been suggested to avoid recurrence of such complaints.

18. In the impugned order (Ext.P1) the Ombudsman has referred to the power under Section 271(Q)(1)(v). But Clause (v) only stipulates that the Ombudsman may order 'other necessary remedial measures considering the facts and circumstances of the case'. The above provision does not give any authority to keep the democratically elected Committee of the local body under suspended animation.

19. In this context it may be pertinent to note that Part IX relating to Panchayat was incorporated in the Constitution by the Parliament by the Constitution (73rd Amendment) Act, 1992. It was aimed at 'securing greater measure of participation of people in the planned development and in local governmental affairs, by constituting village, block and District Panchayats.' It was also provided that the new enactment shall 'endow such Panchayats with such powers and authority to

enable them to function as institutions of self-Government'. The Local Self Government Institutions are given greater autonomy and power. Article 243C of Part IX gave the Legislature of a State power to enact law for composition of Panchayats.' States have also been given the power to authorise a Panchayat to levy, collect and appropriate such taxes, duties, tolls etc. It was also envisaged that the State Legislatures may make law containing provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level with respect to the preparation of plans for economic development and social justice. Schedule XI was also incorporated in the Constitution enumerating the sectors and departments which were to be entrusted to the Panchayats under the Schemes for implementation. Under Article 243E it is provided that every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. Clause (2) of Article 243E mandates that no amendment of any law for the time being in force shall have the effect of causing dissolution of Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in Clause (1). Thus, it is clear that Chapter IX which was enacted in the Constitution by the 73rd amendment ensures a security of tenure to the elected representatives. It also enables a State Legislature to make a legislation for a comprehensive enactment for administration of Local Self Government Institutions.

20. The [Kerala Panchayat Raj Act, 1994](#) was enacted by the Kerala Legislative Assembly in tune with the above constitutional mandate. Panchayats are constituted at the village, intermediate and district levels as provided under Article 243B of the Constitution. Elections are held to these local bodies under the supervision of the State Election Commission which is vested with the power as provided under Article 243K of the Constitution. The Kerala Panchayat Raj (Conduct of Election) Rules, 1995 and other allied Rules are framed for this purpose. The members who are elected in the election are entitled to continue in office for 5 years from the date appointed for the first meeting of the Panchayat. Therefore, it is evident that the elected Committee of the Panchayat functions under a constitutional mandate. A properly elected Committee of the Panchayat cannot be dislodged or removed from office without statutory sanction.

21. In this context it may also be pertinent to refer to Chap.XVIII of the Act which deals with the powers of the Government over the Panchayats. Section 188 of Chap.XVIII empowers the Government to call for any record, register or other document in the possession or under the control of any Panchayat and to inspect any office or any records or other documents of the Panchayats. The Government may also arrange periodical performance audit in respect of the administration of the Panchayat. Section 189 gives power to the Government to issue general guidelines to the Panchayat in accordance with the national and state policies in matters such as finance, maintenance of accounts, office management, formulation of schemes etc. Sub-section (3) of Section 189 states that the Government may take such action as is necessary and permissible under the Act if there is any default in the implementation of the Scheme. Section 190 empowers the Government to direct the Panchayat or its President or Secretary, as the case may be, to fix a period for the performance of any duty imposed by or under the Act or to carry out any orders lawfully issued by the Government. Sub-section (2) authorises the Government to appoint any officer of authority to perform any duty or to carry out the function of the Panchayat, its President or its Secretary, if they fail to perform their duties. However, such action can be taken by the Government only after giving a reasonable opportunity to the Panchayat. Under Section 191, the Government may either suo motu or on a reference by President, Secretary or a member or on a petition received from a citizen, cancel or vary a resolution passed or decision taken by the Panchayat.

22. Section 193 which deals with the power of the Government to dissolve the Panchayat is extracted hereunder:

'193. Dissolution of Panchayats:-

(1) If a Panchayat fails to pass the budget of the Panchayat for the succeeding Financial year before the end of a financial year, which causes financial crisis or majority of its members resign from office or is disqualified, the Government shall, by notification in the Gazette, dissolve the Panchayat from the date specified therein and a copy of the same forwarded to the State Election Commission by the Government:

Provided that, the Panchayat shall be given a reasonable opportunity of being heard before such dissolution.

(2) If the Government is of opinion that Panchayat persistently makes default in performing the duties imposed on it by law or in carrying out the order or directions lawfully issued by the Government or exceeds or abuses its powers, the Government may by notification in the Gazette, dissolve the said Panchayat and shall forward a copy of the same to the State Election Commission:

Provided that, before such dissolution, the Government shall communicate to the Panchayat the proposal to dissolve the Panchayat along with the reasons for the same and give the Panchayat a reasonable opportunity to show cause against it and shall consider the objections or explanation if any:

Provided further that, if it is proposed to dissolve the Panchayat after considering the objections or explanation of the Panchayat, it shall seek the advice of the Ombudsman constituted under Section 271G and take a final decision on the basis of such advice.'

A perusal of the above provision shows that the Government can dissolve a Panchayat if it fails to pass the budget of the Panchayat for a financial year or if majority of its members resign from office or is disqualified. Sub-section (2) also empowers the Government to dissolve a Panchayat if it persistently makes default in performing the duties imposed on it by law or in carrying out the order or directions lawfully issued by the Government or exceeds or abuses its powers. But the Government can take action only after giving the Panchayat a reasonable opportunity to show cause against the proposed dissolution. The objections raised by the Panchayat have to be considered by the Government. The second proviso to Sub-section (2) of Section 193 shows that the Government has to seek the advice of the Ombudsman before it takes a final decision on the proposal to dissolve the Panchayat. Thus it is clear that the Act confers the power of dissolution of an elected Committee of a Panchayat only on the Government. Even the Government can exercise that power only after issuing a show cause notice to the Panchayat. The objections of the Panchayat against the proposed dissolution have to be considered by the Government. Thereafter, the Government have to

seek the advice of the Ombudsman before a final decision is taken for dissolution.

23. In the case on hand, the elected members of the Panchayat were not parties in the complaint filed by respondent No. 1. Only the President and Secretary of the Panchayat were arrayed as parties in the complaint. Even the President and Secretary had no inkling of what was to follow. A statement was filed by the President (petitioner) in response to the complaint. The steps taken by the Panchayat to stop the illegal excavation were mentioned in the statement. We do not propose to go into the merits of the complaint or the veracity or acceptability of the contentions raised by the Panchayat in response to the above complaint. But it is relevant to note that the Deputy Director of Panchayat had clearly mentioned in his report that without the active assistance and support of the revenue and police authorities, the Panchayat can not be in a position to stop the illegal activity in toto. This position is clearly understandable. Though an institution of Local Self Government, the Panchayat has no police force to ensure compliance of its orders. It has to depend on the Government or the local police. This is precisely what the President had projected in the reply.

24. Thus, a perusal of the statutory provisions clearly shows that the impugned order passed by the Ombudsman is illegal and without jurisdiction. The scheme of the Act unambiguously shows that the Ombudsman is not vested with any power either to keep the elected Panchayat Committee under suspended animation or to appoint a Receiver to administer it. As indicated by us earlier, the Ombudsman cannot arrogate to himself any authority or power that has not been statutorily sanctioned. If any irregularity in administration is noticed, the Ombudsman is not without power to issue appropriate orders/directions to keep the Local Self Government Institutions within their bounds.

In the above facts and circumstances, the order at Ext.P1 issued by the Ombudsman is quashed. The Original Petition is allowed. No costs.