

(2022) 11 KL CK 0253

High Court Of Kerala

Case No: Writ Petition (C) No. 26781 Of 2021 &amp; 6706 Of 2022

Prestige Estates Projects Limited

APPELLANT

Vs

Secretary Thrikkakara  
Municipality, Kakkanad,  
Ernakulam, Kochi 682030RESPONDENT

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**Date of Decision:** Nov. 22, 2022**Acts Referred:**

- Kerala Panchayat Raj Act, 1994 - Section 271(F), 271(F)(1)(b), 271(J), 271(M), 271M(4)
- Kerala Municipality Act 1994 - Section 29, 30

**Hon'ble Judges:** T.R. Ravi, J**Bench:** Single Bench**Advocate:** Joseph Markose, Alexander Joseph Markos, Sharad Joseph Kodanthara, V.Abraham Markos, S.Jamal, Manu Ramachandran, Deepa K.R., Ansu Varghese, M.Kiranlal, R.Rajesh, T.S.Sarath, Sameer M Nair, Sabikh Mohammed V.S, Geethu Krishnan, Harsha Susan Sam

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**Judgement**

T.R. Ravi, J.

1. The two writ petitions are filed by the same petitioner and the primary challenge in these writ petitions is to the jurisdiction of the 3rd respondent

(Ombudsman for Local Self Government Institutions) in entertaining complaints against the construction of buildings based on building permits issued by the Local Self Government Institutions.

2. The petitioner is a company that is undertaking the construction of residential and commercial projects. They have undertaken the construction of the Prestige Hillside Gateway in Kakkanad. The petitioner obtained all necessary permissions and building permits as early as in 2015. The petitioner

submits that 3 of the towers are practically completed, and 2 other towers are getting ready. It is stated that there are 353 allottees already in the project. The petitioner has obtained registration under the Real Estate Regulatory Authority (RERA) and obtained consent for the completion of the project on or before 31.12.2022. The documents referred to are as referred to in W.P.(C)No.6706/2022.

3. Ext.P1 is the layout approval dated 30.09.2015 issued by the Chief Town Planner, Thiruvananthapuram. Ext.P2 is the building permit dated 06.10.2015 issued by the 1st respondent. On 01.11.2021, the 1st respondent issued Ext.P3 notice to the petitioner, titled as notice/stop memo. The notice refers to a complaint submitted by the 2nd respondent. The notice directs the petitioner to carry out some changes in the construction. There is a direction to remove certain electrical equipment which have been fixed below the driveway. It directs the petitioner to produce documents relating to ownership within 7 days. There is also a direction to consider the complaint of the neighboring residents that the petitioner is not following the security requirements while making the construction which results in the accumulation of a lot of dust and other construction materials on the properties of the neighbours. The petitioner submitted Ext.P4 explanation on 11.11.2021. The 2nd respondent approached the 3rd respondent with a complaint and the 3rd respondent issued Ext.P5 order directing the petitioner to stop the construction work and further directing the 1st respondent to seek the advice of the City Police Commissioner, Kochi to implement Ext.P3 stop memo. The order was issued ex-parte without noticing the fact that the petitioner had submitted his explanation to Ext.P3 notice. On receipt of Ext.P5 order, the 1st respondent immediately responded by issuing Ext.P6 order directing the petitioner to stop construction. Reference is made in Ext.P6 to Ext.P5 order issued by the 3rd respondent. The petitioner approached this Court by filing WP(C) No.26781 of 2021 praying to quash Ext.P5 order and Ext.P6 stop memo. On 30.11.2021, this Court granted an interim stay of Ext.P3 notice on condition that the petitioner carries out the conditions provided in the Environmental Clearance and takes appropriate steps to see that the complaints raised by the 2nd respondent and the residents' association are redressed without delay. It was ordered that the apprehension expressed

regarding the operation of the aerial crane and the falling of debris shall be appropriately addressed by the petitioner. There is also a direction to the petitioner to address the complaints regarding the discharge of effluents and waste into the drainage and to make the STP functional at the earliest.

The Municipality has been directed to take appropriate steps for permitting the petitioner to continue the construction activity after conducting due inspections. On receipt of the complaint which had been filed before the 3rd respondent, the petitioner filed their written statement. The 3rd respondent issued an order on 19.01.2022 (Ext.P15). The order does not show that the contentions of the petitioner had been considered.

The 3rd respondent noted that there are averments and counter averments regarding the question whether the construction is in accordance with the

Rules, and directed the Regional Joint Director of Urban Affairs to inspect the construction and report whether there is any violation since the 3rd

respondent was of the view that it would be better to stop illegal constructions at the earliest stage instead of permitting the construction to go on,

which will only result in waste. Pursuant to Ext.P15, the Regional Joint Director issued Ext.P16 notice on 23.02.2022 informing the petitioner that an

inspection will be carried out on 03.03.2022 at 11.00 a.m. W.P. (C)No.6706 of 2022 has been filed praying to quash Ext.P15 order and to quash

Ext.P12 complaint filed before the 3rd respondent and for staying the operation and implementation of all further proceedings pursuant to Exts.P15 &

P16 in O.P. No.465/2021 pending before the 3rd respondent. On 02.03.2022, this Court admitted the second writ petition and ordered to keep in

abeyance all further proceedings pursuant to Ext.P15.

4. The 2nd respondent has filed a counter affidavit. It is stated that Ext.P12 complaint has been preferred since the 1st respondent failed to address

various violations committed by the petitioner despite being pointed out by the 2nd respondent, and hence there is a case of maladministration on the

part of the 1st respondent, which can be looked into by the 3rd respondent. Reference is made to O.S.No.151/2020 preferred by the Link Valley

Residential Community residents. A complaint dated 31.08.2021 submitted by the 2nd respondent before the 1st respondent has been produced as

Ext.R2(a), wherein the violations have been narrated. It is further stated that the 3rd respondent has been approached through Ext.P12 complaint

seeking action in terms of Chapter XXV A of Kerala Panchayat Raj Act, the provisions of which have been made applicable to Municipalities. It is

contended that the action initiated by the 3rd respondent is very much within the jurisdiction and is in accordance with the powers available under

Section 271(J) of the Kerala Panchayat Raj Act read with Rule 17 of the Ombudsman for Local Self Government Institutions (Inquiry of Complaints

and Service Conditions) Rules, 1999.

5. Heard Sri.Joseph Markose, Senior Advocate instructed by Sri.Abraham Markos on behalf of the petitioner, Sri.S.Jamal on behalf of the 1st

respondent, Sri.Manu Ramachandran on behalf of the 2nd respondent and Smt.K.R. Deepa, Special Government Pleader, LSGD on behalf of the

State.

6. Chapter XXVB of the Kerala Panchayat Raj Act, 1994 contains the provisions relating to Ombudsman for Local Self Government Institutions.

Section 271(F)(1)(b) defines allegation in the following manner:

“(1) For the purpose of this Chapter-

(a) xxxxxxxx xxxxxxxx xxxxxxxx

(b) 'allegation'-

(a) in relation to a public servant means, any affirmation that such public servant-

(i) has abused his position as such for any gain or favour to himself or to any other person or to cause undue harm or hardship to any other person;

(ii) was actuated in the discharge of his functions as such public servant by personal interest or improper or corrupt motives;

(iii) is guilty of corruption, favouritism, nepotism or lack of integrity;

(iv) is guilty of any action as public servant which facilitates or causes to make any loss, waste or misapplication of money or other property of the Local Self

Government Institution.

(b) in relation to a Local Self Government Institution means any affirmation that such Local Self Government Institution has defaulted or acted in excess of its powers

in the discharge of its functions imposed on it by law or in implementing the lawful orders and directions of the Government;

(c) 'Complaint' means a statement of allegation that a public servant or a Local Self Government Institution is guilty of corruption or maladministration and includes any reference to an allegation in respect of which suo motu enquiry has been proposed or recommendation for enquiry has been made by Government;

(d) 'Corruption' includes anything punishable under Chapter X of the Indian Penal Code (Central Act 45 of 1860) or under the Prevention of Corruption Act, 1988 (Central Act 49 of 1988);

(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 mal-feasance or misfeasance.â€

The contention is that the inaction on the part of the 1st respondent on the complaint submitted by the 2nd respondent amounts to maladministration

and hence the Ombudsman for Local Self Government Institutions is having necessary jurisdiction to entertain the complaint.

7. Section 29 of the Kerala Municipalities Act states that the administration of the Municipality shall vest in the Council. Section 30 of the Act deals

with the powers, functions, and responsibilities of the Municipality and says that the Council has the duty of administering the Municipal area in respect

of matters which have been enumerated in the First Schedule. The First Schedule contains mandatory functions and general functions. The first

category stated in mandatory functions is the regulation of building construction. It is hence contended that an administrative function of the

Municipality, if not properly performed will amount to maladministration. Section 271(j) deals with the functions of the Ombudsman. It includes

investigation into any allegation contained in a complaint or on a reference by Government or that has come to the notice of the Ombudsman. The

Ombudsman can also enquire into any complaint in which corruption or maladministration of a public servant, or a Local Self Government Institution is alleged.

8. A Division Bench of this Court in Mayor of Kochi V. Ombudsman For Local Self Government Institutions reported in [2004 (2) KLT 621]

considered the question whether the Ombudsman appointed is competent to proceed against a Municipality or a Municipal Corporation. This Court

held that the Ombudsman has jurisdiction over the Panchayat as well as Municipalities which are both institutions of Local Self Government. A

learned Single Judge of this Court in Reghuvara Panicker R. V. Secretary, Maranallur Grama Panchayat & Anr. reported in [2009 (4) KHC 170]

considered a complaint of inaction on the part of the Panchayat Secretary and held that the Ombudsman can direct the Panchayat Secretary to take a

decision on the complaint. It was found that inaction will confer jurisdiction on the Ombudsman to interfere in a matter. In Krishnan Nair V. Secretary,

Corporation of Thiruvananthapuram reported in [2010 (2) KLT 128], a learned Single Judge held that the Local Self Government Institutions are duty

bound to carry out commands of the LSGI Tribunal and failure to do so, would amount to maladministration. In Kulukkalloor Grama Panchayat V.

Ombudsman for Local Self-Govt. Institutions & Ors. Reported in [2013 (2) KHC 133], an order was issued by the Ombudsman directing payment in a

complaint alleging that the Panchayat has failed to make a payment towards the cost of material supplied by the complainants. The Court noticed that

the word “maladministration” is defined as any action taken or purporting to have been taken in the exercise of administrative functions in any

case where such action, administrative procedure or practice governing such actions is unreasonable, unjust, oppressive, discriminatory, or nepotistic and

will make an illegitimate gain or loss or will deny deserving benefits and that it included wilful negligence or delay in taking decisions. This Court found

that in a case where the claim is for money based on materials supplied and where the claim is disputed, the same will not come under the purview of

allegation or complaint or maladministration as defined under Section 271(F). In *Fr.Laberin Yesu V. K.Biju, I.A.S. and Others* reported in (2020 (5)

KHC 552) this Court was considering a complaint before the Ombudsman regarding a building permit that was alleged to have been issued by the

officials of the Corporation flouting statutory provisions. This Court held that going by Section 271(M) of the Kerala Panchayat Raj Act, 1994, the

Ombudsman is interdicted from enquiring into any matter in respect of which remedy is available to the complainant before the Tribunal for Local Self

Government Institutions. The Court held that as far as a building permit is concerned, if the contention is that the rule has been flouted, the remedy is

to challenge the building permit before the Tribunal. The Court agreed with the contention of the petitioner therein that the Tribunal cannot grant relief

against the officials of the Corporation who are alleged to have abused their position as public servants. The Court however found that, sustainability

or otherwise of the building permit has to be first gone into and it is only after the petitioner is able to successfully challenge the building permit before

the Tribunal, that the question regarding abuse of position as public servant for personal gain in the matter of issuing building permit will arise. Even

though reference was made to Rules 17 and 13 of the Ombudsman for Self Government Institutions (Enquiry of Complaint and Service Conditions)

Rules, 1999 in support of the contention that the Ombudsman has jurisdiction, the same may not be relevant in this case. Rule 17 deals with the power

of the Ombudsman to suspend temporarily any action which is the ground for a complaint. If the action complained of is the grant of a building permit

or the manner in which the building permit is being put to use, necessarily, there cannot be an action over which the Ombudsman can have jurisdiction

in view of Section 271M. Rule 19 is the power of the Ombudsman to get the matter investigated by any Police Officer or other Government Officers

or any Technical Experts. Such orders can also be issued only if the complaint itself is entertainable by the Ombudsman in the teeth of Section

271M(4).

9. In the case on hand, a reading of the complaint filed before the Ombudsman would show that it relates to the manner in which the petitioner is

carrying out the construction on the strength of the building permit which has been issued to him. The allegations are that the construction is made

violating the Building Rules and that even though complaints were filed before the Secretary of the Municipality, action is not being taken. It is stated

that the Municipality is helping violators and hence the Ombudsman may intervene. A reading of the complaint would show that without a finding by

appropriate authority regarding the violation of the Building Rules in the construction that has been effected by the petitioner, an action before the

Ombudsman would not be possible in terms of Section 271M(4). The Municipality Building Rules contains several provisions regarding the manner in

which the construction is to be carried out and the power of the Secretary to regulate construction that is being made on the basis of building permit

which has been issued. A complaint regarding violation can only be taken up before the Tribunal and if the Tribunal renders a finding in favour of the

3rd respondent, necessarily, the 3rd respondent will be able to maintain an application before the Ombudsman, if he has a case that the violations have

been permitted by the Officials of the Corporation by action or inaction which can be brought within the meaning of the word "maladministration".

I am in respectful agreement with the view expressed by this Court in *Fr.Laberin Yesu* (supra).

In the above view of the matter, the petitioner is entitled to succeed in these writ petitions. The order Ext.P5 dated 23.11.2021 in W.P.(C)No.26781 of

2021 is quashed. The order Ext.P15 issued by the 3rd respondent and Ext.P16 issued by the 4th respondent in W.P.(C)No.6706 of 2022 are also

quashed. It is declared that Ext.P12 complaint is not maintainable before the 3rd respondent. The Secretary of the Thrikkakara Municipality, who is

the 1st respondent, has to consider whether Ext.P6 stop memo dated 25.11.2021 has to be continued, untrammelled by the orders issued by the 3rd

respondent. It is made clear that this Court has not expressed any view regarding the merits of the allegations contained in the complaint filed by the

2nd respondent before the 3rd respondent and all the contentions of the 2nd respondent as against the construction that is being effected by the

petitioner are left open to be agitated before the appropriate forum.