

# VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

MONDAY, THE 12<sup>TH</sup> DAY OF DECEMBER 2022 / 21ST AGRAHAYANA, 1944

WP(C) NO. 15511 OF 2021

PETITIONER:

JUSTICE K.K. DENESAN (RTD. JUDGE)  
AGED 75 YEARS  
RETIRED JUDGE, HIGH COURT OF KERALA, ERNAKULAM,  
RESIDING AT KADVAILPARAMBIL HOUSE, THRIKKADAKKAPPILLY,  
CHERAI, ERNAKULAM-683514.  
BY ADVS.  
K.JAJU BABU (SR.)  
M.U.VIJAYALAKSHMI  
BRIJESH MOHAN

RESPONDENTS:

- 1 THE SENIOR ACCOUNTS OFFICER  
OFFICE OF THE ACCOUNTANT GENERAL (A&E) KERALA,  
THIRUVANANTHAPURAM-695001.
- 2 THE ACCOUNTANT GENERAL (A&E) KERALA,  
THIRUVANANTHAPURAM-695001.
- 3 STATE OF KERALA  
REPRESENTED BY THE SECRETARY TO GOVERNMENT OF KERALA,  
LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT,  
THIRUVANANTHAPURAM-695001.  
SRI.RANJITH K.R, GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON  
12.12.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**JUDGMENT**

**Dated this the 12<sup>th</sup> day of December, 2022**

This writ petition is filed seeking the following prayers:

*“(ia) Issue a writ of certiorari or any other appropriate writ, order or direction, calling for Ext.P6 and quash the same to the extent the 3<sup>rd</sup> respondent directs respondents 1 and 2 to reduce the pay of the petitioner by the amount of pension he has been receiving as mentioned in Ext.P5 on appointment as Ombudsman as per Ext.P1.*

*(ii) Issue a writ of certiorari or any other appropriate writ, order or direction to call for the records leading to Ext.P5 and to quash the same in so far as it arbitrarily deny the petitioner his legitimate right to get full salary and allowances on appointment as Ombudsman without reducing the amount of pension paid to him.*

*(iii) Issue a writ of mandamus or any other appropriate writ, order or direction, commanding the respondents to authorize and disburse forthwith, the arrears of salary and allowances due to the petitioner for service rendered as Ombudsman on appointment as per Ext.P1 w.e.f. 22.12.2017 to 21.12.2020 without reducing the pension received by him, as expeditiously as possible, and within a time frame to be stipulated by this Hon’ble Court.*

*(iv) Declare that the petitioner is entitled for interest on the arrears of salary as Ombudsman on appointment as per Ext.P1 reckoned from the dates the said amounts became due.”*

2. Heard the learned senior counsel appearing for the petitioner and the learned Government Pleader appearing for the respondents.

3. It is submitted by the learned senior counsel for the petitioner that the petitioner was appointed as an Ombudsman under the Kerala Panchayat Raj Act and Rules by Ext.P1 order dated 01.12.2017. He was sworn in as Ombudsman on 22.12.2017 and discharged his duties as such till 21.12.2020. The learned senior counsel for the petitioner submits that Section 271 G of the Panchayat Raj Act provides for the terms and conditions of service of the Ombudsman. The provision reads as follows:

*“271 G. Term of office and conditions of Service of Ombudsman.*

*(1) There shall be an authority for Local Self Government Institutions, at State Level known as ‘Ombudsman’ for making investigations and enquiries, in respect of charges on any action involving corruption or maladministration or irregularities in the discharge of administrative functions, in accordance with the provisions of this Act by Local Self Government Institutions and Public Servants working under them and for the disposal of such complaint in accordance with Section 271 Q.*

*(2) The Governor shall, on the advice of the Chief Minister, appoint a person who has held the post of a Judge of the High Court as Ombudsman.*

*(3) A person appointed to be the Ombudsman shall, before he enter upon his office, make and subscribe before the Governor or some person appointed in that behalf by him, an oath or affirmation according to the form set out below:*

*“I,A.B. having been appointed as the Ombudsman for Local Self Government Institutions under the Kerala Panchayat Raj Act, 1994, do swear in the name of*

*God/Solemnly affirm that I will bear true faith and allegiance to the Constitution of India and I will duly and faithfully and to the best of my ability, knowledge and judgement perform the duties of my office without fear or favour, affection or ill-will”*

*(4) A person appointed as Ombudsman shall hold office for a term of three years from the date on which he enters upon his office: Provided that, - (a) the Ombudsman may, by writing under this hand addressed to the Governor, resign his office; and (b) the person appointed as Ombudsman may be removed from his office in the manner provided in Section 271 H.*

*(5) The person appointed as Ombudsman shall be entitled for salary and allowances as are admissible to a Judge of the High Court of Kerala.*

*(6) On expiry of his term of office as Ombudsman, he shall not be eligible for reappointment as Ombudsman or for further appointment to any office of profit under the Government of Kerala or in any corporation, company, society or university by or under the control of the Government of Kerala.]”*

It is contended that the petitioner, on his appointment as Ombudsman, was entitled to salary and allowances as are admissible to a judge of the High Court of Kerala. However, it is submitted that the petitioner was paid only the salary of a High Court Judge after deducting the pension being received by him. The petitioner submitted Ext.P3 representation before the Accountant General for fixation of salary as Ombudsman equivalent to the salary and allowances drawn by a High Court Judge. This Court by Ext.P4 judgment directed the

consideration of Ext.P3 representation adverting to the Act and Rules. However, though the direction was specifically to the Accountant General, Kerala to consider the representation, Ext.P5 order dated 05.05.2021 was rendered by a Senior Accounts Officer relying on a Government letter and fixing the salary deducting the pension drawn by the petitioner. Ext.P6 is the letter referred to and relied on in Ext.P5. In the said letter, which is signed by a Special Secretary for the Additional Chief Secretary to Government addressed to the Deputy Accountant General in the Office of the Accountant General, it is stated that the petitioner is entitled to fixation of his salary by reducing the amount of pension he has been receiving for his service as Judge in the High Court of Kerala and Upalokayukta. No reason, whatsoever, is stated for the said opinion expressed by the said officer.

4. The learned senior counsel appearing for the petitioner would contend that the provisions of Section 271 G as well as Rule 4 of the Ombudsman for Local Self Government Institutions (Inquiry of Complaints and Service Conditions) Rules, 1999 specifically provide that the Ombudsman shall be entitled for salary and allowances

equivalent to that of a High Court Judge. It is submitted that there is absolutely no provision, whatsoever, for making deductions of the pension paid on account of earlier service rendered as a Judge of the High Court from the amounts payable to the petitioner for service rendered by him as Ombudsman. It is further contended that in case of enactments where identical provisions were existing, Exts.P7 and P8 orders have been issued in respect of Chairperson and Judicial and Administrative Members of the Kerala Real Estate Appellate Tribunal stating that the payment should be made without making any deduction, since the Act and the Rules did not provide for any deduction. The learned senior counsel for the petitioner would also contend that since there is no provision in the enactment or the rules for making any deduction of the pension drawn by the petitioner as a Judge of the High Court, there can be no such deduction on the strength of an erroneous understanding by respondents 2 and 3.

5. The learned senior counsel would also place reliance on a decision of the Apex Court in **V.S. Mallimath v. Union of India and another** [2001 (4) SCC 31] to contend that it is only in cases where the

Act or the Rules provides for deduction of the pension already drawn being made from the salary payable that such reductions would be possible.

6. Detailed counter affidavits have been placed on record by the respondents. In the counter affidavit filed on behalf of respondents 1 and 2, it is contended that since the petitioner is a retired Judge of the High Court of Kerala and is drawing pension for his prior service, his pay and allowances are to be fixed less the pension drawn as was done in the case of other judges who are reemployed after retirement. It is stated that earlier persons functioning as Ombudsman were also paid the salary applicable to High Court Judges after deducting pension alone. It is further contended that by letter dated 22.04.2020, the Principal Secretary to Government, Local Self Government (IA) Department clarified that as the petitioner is a retired High Court Judge, he is eligible for pay and allowances as per Rule 100 Part III, KSR and that his pay and allowances shall be fixed as stipulated therein. With regard to the direction in Ext.P4 to the Accountant General to consider the representation submitted by the petitioner, it is stated as follows:

*“10. It is respectfully submitted that the second respondent, being the Accounts Officer of the State of Kerala, is being impleaded as one of the respondents in a large number of cases filed by the employees/pensioners of the State Government including educational institutions aided by the State Government before the Hon’ble High Court, Hon’ble Kerala Administrative Tribunal and in various judicial and quasi-judicial fora. With a view to ensure timely compliance of judgments/orders of the Hon’ble Courts, on receipt of Judgments/Orders, etc. where there is a direction to the Principal Accountant General (A&E), Kerala, this office being the implementing authority, the functional wing/section concerned in this office will examine the matter and in cases where consultation with the State Government/Department is required, final decision is taken based on the communication received from the State Government/Department concerned. In all such cases, the decision taken by this office is communicated to the petitioner/applicant. This was the circumstance that led to the issuance of Exhibit P5 to the petitioner.*

*11. Regarding the contention of the petitioner that the first respondent is incompetent to take final decision on Exhibit P3, it is respectfully submitted that the circumstances that led to the issuance of Exhibit P5 to the petitioner by the first respondent has already been explained in para 10 *ibid*. It is also submitted that as already stated, the Principal Accountant General (A&E) Kerala being only an implementing authority of the Rules and orders issued by the Government from time to time, could not deviate from the orders of the Government while taking a final decision on Exhibit P3.”*

7. A further counter affidavit has been filed by the 3<sup>rd</sup> respondent wherein it is contended that Section 271 G of the Panchayat Raj Act and Rule 4 of the Ombudsman for Local Self Government Institutions



(Inquiry of Complaints and Service Conditions) Rules, 1999 provide that the person appointed as Ombudsman shall be entitled for salary and allowances as are admissible to a Judge of the High Court of Kerala. It is stated that the said Act as well as Rules does not specify the pay and allowances admissible to the Ombudsman, if the person appointed is a retired Judge, who is in receipt of pension. Since the petitioner is a retired judge of the High Court of Kerala and was drawing pension, the Accountant General had authorized him pay and allowances of High Court Judge less pension drawn. It is further contended that “an employee cannot retire with a view to being reemployed and drawing pension in addition to pay whether in the service of the Government or of a Local Fund”. It is further contended that in the case of reemployed Supreme Court/High Court Judges appointed as Commissions/Committees of Enquiry, the Central Government had issued Office Memoranda stating that the pay together with pension and pension equivalent or other forms of retirement benefits should be restricted to Rs.2,25,000/month in case of retired High Court Judges and Rs.2,50,000/month in case of retired Chief

Justice of High Courts/Judges of Supreme Court. It is further contended that it was clarified vide Ext.P6 that as per Section 271 G (5) of the Kerala Panchayat Raj Act, 1994, Ombudsman shall be entitled for salary and allowances as are admissible to a Judge of the High Court of Kerala and petitioner's pay as Ombudsman is to be reduced by the amount of pension he has been receiving. It is submitted that, accordingly, the office of the Accountant General fixed the pay of the petitioner.

8. The learned Government Pleader also placed reliance on a decision of the Apex Court in **Accountant General, M.P. v. S.K. Dubey and another** [2012 (4) SCC 578] with regard to the pension payable to President and Members of the Consumer Disputes Redressal Commission as well as the judgment of the Apex Court in **Justice P.Venugopal v. Union of India** [2003 (7) SCC 726].

9. I had considered the contentions advanced. I notice that the provisions of the Act and the Rules are quite clear in as much as the provision specifically provides that a person appointed as Ombudsman would be entitled to salary and allowances equivalent to that of a High

Court Judge. The Act or the Rules, admittedly, do not provide for any deduction of pension. It is also not in dispute before me that in identical situations, the pay of the Chairperson of the Kerala Real Estate Appellate Tribunal who was appointed as such and assumed charge on 21.04.2020 has been fixed without making any deductions for the pension drawn by him by Ext.P7 order dated 14.06.2020. The reason for granting the pay and allowances without making any deductions is explained in the additional affidavit by stating that the provisions of the Real Estate (Regulation and Development) Act, 2016 and the Kerala Real Estate (Regulation and Development) Rules, 2018 do not permit any such deduction and that the monthly salary payable to the Chairperson is the salary equivalent to the last drawn salary by such person as a Judge of High Court.

10. In the instant case, I notice that the provisions of the Act and the Rules do not permit any deduction of the pension drawn in the capacity of a High Court Judge from the amount payable to the petitioner. The contention that the petitioner is a reemployed pensioner who is, in any manner, governed by the provisions of the Kerala Service Rules is a

completely erroneous assumption which I am surprised that officers like respondents 2 and 3 are still laboring under. A High Court Judge draws pension in terms of the specific provisions of the High Court Judges (Salaries and Conditions of Service) Act, 1954 as amended from time to time as well as the High Court Judges Rules, 1956. The pension payable to a High Court Judge is deferred payment for his service as such and unless there is a specific provision in the enactment or the Rules which provides for the appointment of Ombudsman for deducting the amount drawn by the appointee as pension for his service as a High Court Judge, there can be no deduction on the basis of the subjective satisfaction of the officers occupying the post of respondents 2 and 3 or any of their subordinate officers.

11. I notice that Ext.P4 judgment specifically directed the 2<sup>nd</sup> respondent to consider the representation submitted by the petitioner. However, it is clear from the pleadings on record and the documents that there has been no such exercise by the 2<sup>nd</sup> respondent to consider and pass a speaking order on the petitioner's claim. It is clear that relying on Ext.P6, which is a communication issued by an officer in the

Department to the Deputy Accountant General, Ext.P5 exercise has been done by the 1<sup>st</sup> respondent.

12. Article 166 of the Constitution of India reads as follows:

*“166. Conduct of business of the Government of a State*

*(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor*

*(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order on instruction which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor*

*(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.”*

The exercise of the executive power of the State has to be in the manner as provided under Article 166 and a subjective decision or an opinion expressed by an officer in a letter in the nature of Ext.P6 to the Deputy Accountant General, can, by no stretch of imagination, do duty for an executive order passed by the State Government.

13. I notice that the issue raised has not been considered either by the Government or by the Accountant General and, therefore, the

communications issued are vitiated by total want of application of mind. In the result, I find that Exts.P5 and P6 orders are completely unsustainable and are liable to be set aside. With regard to the specific contention of the petitioner that he is entitled to payment of the salary applicable to a High Court Judge at the relevant time, I am of the opinion that the said contention is well founded especially in view of Ext.P7 order passed by the Government itself in the case of a similarly situated person where the provisions of law are also similarly worded. In the above view of the matter, I am of the opinion that the contentions raised by the respondents and the decisions relied on by them have absolutely no application in the facts of the instant case where the Act and the Rules specifically provide for payment of the salary of a High Court Judge to a person appointed as Ombudsman.

In the result, this writ petition is ordered setting aside Exts.P5 and P6 and directing the Government to pass an appropriate order granting the benefit of pay and allowances of a High Court Judge to the petitioner as has been done in Ext.P7. Appropriate orders shall be passed within a period of one month from the date of receipt of a copy

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of this judgment. Arrears thereof shall also be disbursed to the petitioner, without delay, at any rate, within a period of three months thereafter.

**Sd/ -**

**ANU SIVARAMAN**

**JUDGE**

NP

**APPENDIX OF WP(C) 15511/2021**

**PETITIONER'S EXHIBITS**

- Exhibit P1** TRUE COPY OF THE G.O(P) 93/2017/LSGD DATED 1.12.2017 PUBLISHED IN KERALA GAZETTE VIDE NO.2728 DATED 13.12.2017.
- Exhibit P2** TRUE COPY OF THE LIST LOCAL BODIES CONSISTING OF CORPORATIONS, MUNICIPALITIES, DISTRICT PANCHAYATS, BLOCK PANCHAYATS AND GRAMA PANCHAYATS IN THIS STATE AS ON 01.12.2020.
- Exhibit P3** TRUE COPY OF THE REPRESENTATION DATED 5.4.2019 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.
- Exhibit P4** TRUE COPY OF THE JUDGMENT DATED 18.12.2020 IN WPC NO.28331/2020 OF THIS HON'BL COURT.
- Exhibit P5** TRUE COPY OF THE LETTER VIDE NO.GE 15/A/A1/RE-EMPT/52 DATED 05.05.2021 SENT BY THE 1ST RESPONDENT TO PETITIONER.
- Exhibit P6** TRUE COPY OF THE LETTER VIDE NO.IA4/303/2019/LSGD DATED 10.03.2021 FORWARDED BY THE ADDL. CHIEF SECRETARY TO GOVERNMENT TO DEPUTY ACCOUNTANT GENERAL (GE).
- Exhibit P7** TRUE COPY OF THE GOVERNMENT ORDER GO (RT). NO.1133/2020/LSGD DATED 14.06.2020.
- Exhibit P8** TRUE COPY OF THE GOVERNMENT ORDER GO (RT). NO.2098/2021/LSGD DATED 26.10.2021.

**RESPONDENTS' EXHIBITS**

- Exhibit R1 (a)** True copy of the Government letter No.IA4/303/2019/LSGD Dated 10.03.2021.