

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON
&**

THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

THURSDAY, THE 2ND DAY OF JULY 2015/11TH ASHADHA, 1937

WA.No. 898 of 2015 ()

AGAINST THE JUDGMENT IN WP(C) 2894/2015 of HIGH COURT OF KERALA DATED

APPELLANT/THIRD PARTY

**PRAKASH KARUNAKARAN NAIR AGED 58 YEARS
S/O.KARUNAKARAN NAIR, MYSTIC HEIGHTS PHASE 2
FLAT NO 4 C, KANIYAMPUZHA ROAD, VYTILA
COCHIN**

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDEN/PETITIONER AND RESPONDENTS 1 TO 3

- 1. MHIOA MYSTIC HEIGHT OWNERS ASSOCIATION
REGD. OFFICE AT GROUND FLOOR, SHWAS MYSTIC HEIGHTS 1
KANIYAMPUZHA ROAD, EROOR P.O, TRIPUNITHURA
REP.BY ITS JOINT SECRETARY CAPT.(REGD)
AYYAPPAN SATISH PILLAI
S/O. LATE K A AYYAPPAN PILLAI, 38/2363 F
BL BLUE MOON APARTMENTS GANDHI NAGAR, KALOOR P.O
ERNAKULAM-682 017**
- 2. CAPT.9RETD) AYYAPPAN SATISH PILLAI,
S/O.LATE K A AYYAPPAN PILLAI,38/2363 F, BL BLUE MOON APARTMENTS
GANDHI NAGAR,KALOOR P.O,ERNAKULAM 682 017**
- 3. THE EXECUTIVE ENGINEER,
KERALA STATE ELECTRICITY BOARD, TRIPUNITURA 682 301**
- 4. THE ASSISTANT EXECUTIVE ENGINEER,
KERALA STATE ELECTRICITY BOARD, EROOR-682 301**
- 5. M/S. SHWAS HOMES PRIVATE LTD
GROUND FLOOR, MYSTIC HIGHTS, KANIYAMPUZHA ROAD
EROOR VILLAGE, KANAYANNUR TALUK
ERNAKULAM DISTRICT-682 306
REP BY ITS DIRECTOR SREENI PARAMESWARAN**

**R1,R2 BY ADV. SRI.N.M.MADHU
R3,R4 BY SRI.SAJU KUMAR.K.GOPAL
R5 BY ADV. SRI.S.VINOD BHAT**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 02-07-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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APPENDIX

PETITIONER'S EXHIBITS

**EXT.P1 : TRUE COPY OF THE SALE DEED NO.3687/2007 DATED 31.3.2007 OF
S.R.O. THRIPPUNITHURA**

**EXT.P2 : TRUE COPY OF THE REGISTRATION CERTIFICATE OF THE FIRST
PETITIONER ASSOCIATION**

**EXT.P3 : TRUE COPY OF THE JUDGMENT IN O.S.270/2011 ON THE FILES OF
THE PRINCIPAL MUNSIF COURT, ERNAKULAM**

**EXT.P4 : TRUE COPY OF THE PHOTOGRAPHS SHOWING PREPARATORY
WORKS**

**EXT.P5 : TRUE COPY OF THE LETTER SENT BY THE PETITIONER BY
REGISTERED POST ADDRESSED TO RESPONDENTS ONE AND TWO**

RESPONDENT'S EXHIBITS

NIL

//TRUE COPY//

PA TO JUDGE

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**P.R.RAMACHANDRA MENON
&
BABU MATHEW.P.JOSEPH, JJ**

W.A.No.898 of 2015

Dated this the 2nd day of July, 2015

JUDGMENT

P.R.RAMACHANDRA MENON

The direction given by the Learned Single Judge in W.P.(C).No.2894 of 2015 filed by the respondents 1 and 2 herein, directing the Additional District Magistrate to look into the dispute referred to by the Electricity Board and to deal with the matter in terms of Section 16 of the Indian Telegraph Act, with regard to the drawing of Electricity cable from the property named as "Mystic Heights - 1" to the premises of "Mystic Heights - 2" is sought to be challenged at the instance of third party, who is stated as the owner of a flat in Mystic Heights -2; of course after obtaining leave of this Court.

2. The respondents 1 and 2 approached this court by filing the writ petition, mainly contending that there was an attempt on the part of the builder, who has been shown as the third respondent in the writ petition and 5th respondent in the appeal, to illegally tap electricity from the transformer planted in the premises of Mystic Heights -1 and that, the same was brought to the notice of the authority of the respondent Board,

by filing Ext.P5, which was not acted upon. In the said circumstance, a direction was sought for against the Board to take appropriate and effective action to undo the works done by the third respondent, the Builder, for drawing electricity from the appurtenant property (Phase I) to the neighbouring property (Phase II) and also to declare that the builder has no right or authority for drawing electricity from the appurtenant property (Phase I) to the neighbouring property (Phase II).

3. Pursuant to the notice issued by the learned Single Judge, the respondents entered appearance. Separate counter affidavits were filed both from the part of the Board and also from the part of the Builder. The averments and allegations raised in the writ petition were sought to be rebutted by the Builder, pointing out that there was no attempt at all to tap electricity from the transformer in Mystic Heights -1. It is stated that the installation was made in the common premise, as sanctioned by the Electrical Inspectorate and that two separate structures as 'Phase I' and 'Phase 2' have been constructed therein, though the construction of Phase II was completed only later. As a matter of fact, three projects including Phase I, Phase II and Phase III were involved,

different extents of property were purchased, common plan was sought to be approved and necessary proceedings were filed before the competent authorities, including Pollution Control Board, Fire and Rescue Department, the Local Authority and such other forum. After satisfying the statutory requirements, clearance has been obtained from all corners. As the first step, 'Phase I' was completed and a High tension line was drawn from the road situated on the Southern side of the property.

4. Phase I is located at the southern most end, Phase 3 is on northern most part and phase 2 is in between. Entry is common, which is on the southern side and from there, driveway is provided along the southern, eastern, northern, and western boundaries of the common property lying as a contiguous plot. Separate car parks are also provided. The installation which comes to a common space on the Northern side of Phase I leads to a panel board, from where two outlets are provided, one to Transformer 1 (to deal with the power supply in Phase I) and the other one to be taken to Transformer 2 (with regard to Phase II). The completion of Phase II was effected only later and as a step to provide

electric connection, necessary excavation was effected, laying the cables to have it connected to the outlet No. 2 though the transformer 2 in respect of Phase II. This transformer was originally to be installed in the panel board room; but later, as pointed out by the Electrical Inspectorate, it was subsequently taken out and installed within the premises of Phase II. The work done by the Builder was only to connect the said Transformer to the second and exclusive outlet of the panel board, which in no way, was having any bearing, connection or nexus with the power supply to Phase I.

5. In the meanwhile, there arose some dispute between the writ petitioner association and the Builder. One of the allottees approached the Principal Munsiff Court, Ernakulam by filing O.S.No.270/2011 seeking for a declaration and injunction. The said suit was decreed, against which an appeal was preferred. Since interference was declined and the appeal was dismissed, the aggrieved party has approached this Court by filing R.S.A.No.576/2014, which has been admitted and an interim stay has been granted which is still in existence. It is asserted that no action has been pursued by the Builder, contrary to the relevant provisions of law or to

steal energy from the Transformer provided for Phase I under any circumstance.

6. The version of the Builder seems to be supported by the Electricity Board, who has filed a counter affidavit. It is stated that on receipt of Ext.P5 complaint, the authorities of the Board conducted a spot inspection, when it was revealed that no attempt was ever made by the Builder to tap electricity from the installation provided to Phase I and that the work done was only to connect the second outlet with the Transformer exclusively meant for the second phase. According to the Board, no objectionable activity was pursued by the Builder. The learned Single Judge during the course of proceedings, found it fit to depute an Advocate Commissioner, to ascertain the disputed facts and after inspection, the Commissioner has filed a report. After considering the report, the writ petition was disposed of as per judgment dated 31.3.2015, whereby, the dispute with regard to the drawing of line from Phase I to Phase II was ordered to be referred to the Additional District Magistrate as undertaken from the part of the Electricity Board and the ADM was directed to consider the matter and finalize the same in accordance with law. It was

also ordered that no electricity cable should be drawn to Mystic Heights 2 from Mystic Height 1, in the absence of sanction from the ADM.

7. Pointing out that the directions given by the learned single judge, have quite adversely affected the rights and interest of the owners of the apartment in Phase II, the appellant herein who is stated as the owner of flat No.4C of Mystic Height Phase II, has filed this appeal after obtaining leave of this Court. Main contentions are that, the aggrieved parties were never made parties to the proceedings ; that the issue involved is not a dispute which is liable to be referred for the adjudication of the Additional District Magistrate under Section 16; that the grievance of the writ petitioner was only with regard to the 'theft of electricity' by tapping the line which does not come within the purview of the matter to be enquired by the ADM under Section 16; that, the writ petitioner had already moved the Munsiff Court by filing O.S.No.1005/2011, also filing an interlocutory application for injunction seeking similar benefits, which is still pending; that no interim order of injunction (with reference to the nature of relief sought for in the writ petition and as raised in the prayer No. 'L' and 'N' of the said civil suit) has been obtained and that it was in the said

circumstance, that the party has chosen to approach this Court by filing writ petition, that too, without mentioning anything with regard to filing of the said civil suit. It is stated that, there is clear suppression of material facts. It is added that the verdict passed by the learned single Judge is not in conformity with the nature of grievance projected by the petitioner before the authorities of the Electricity Board by way of Ext.P5, and the relief sought for.

8. Heard, Sri.Sreekumar.G, the learned counsel appearing for the appellant, Sri.N.M.Madhu, the learned counsel appearing for the respondents 1 and 2, Sri.S.Vinod Bhat, the learned counsel appearing for the Builder R5 and Shri.Sajeev Kumar.K.Gopal, the learned Standing Counsel appearing for the Board at length.

9. During the course of hearing, the learned counsel appearing for the writ petitioners submitted that, the root cause for filing the proceedings was inaction on the part of the respondent Board, despite filing of Ext.P5 complaint. For convenience of reference, crux of the contents of the said complaint are extracted below;

“This complaint is forwarded on behalf of the residents of the Mystic Heights (Phase I). The builder of the particular project M/s.Shwas

Homes Pvt.Ltd, has constructed another residential flat named Mystic Heights(Phase 2). though these are named Mystic Heights phase 1 and Mystic Heights phase 2 both are entirely different flats and different entities. Now the builder is attempting to tap the electric connection and generator connection from Phase 1 to Phase 2 by illegally taking connection from the transformer placed in Phase 1. The builder concerned has no right or authority to do so. It would most adversely affect the rights of the residents of the Phase 1."

10. There is no dispute with regard to the fact that a civil suit was filed as O.S.270/2011 before the Principal Munsiff's Court, which is stated as decreed, as held as per Ext.P3 verdict, and as to the pendency of R.S.A.No.576/2014 and as to the granting of Interim stay which is stated as still in force. There is a serious attempt on the part of the respondents 1 and 2 to contend that the installation where the panel board is situated is exclusively within the premises of Phase I and if it be so, no line could be drawn to provide power supply to Phase II without the consent and concurrence of the respondents 1 and 2. The version of the Builder as well as the appellant herein is that the installation is not situated in the premises of

Phase 1, but in common premises, as evident from Annexure R3 (a), whereby, the site plan has been approved by the competent authorities. The two phases of the project, (Phase 1 and Phase 2), have common entry through the gate, on the southern side. The driveway around both the phases, the installation to be effected as permitted by the Electrical Inspectorate, location of the generators/transformers etc are given in detail, in the given diagram.

11. The appellant contends that the landed property where the Phase I is situated, is only having an extent of 51.5 cents whereas Phase II is in the property having almost 65 cents. Altogether, the property is having a total extent of 116 cents. The prospective purchasers have been given appropriate extent of undivided rights over the property, separately in respect of Phase I and Phase II; but the landed properties have been taken together bringing them to a common pool for the purpose of obtaining the "Building Permit" from the local authority, necessary clearance from the Pollution Control Board, Fire and Rescue Department and such other statutory authorities. It was accordingly, that the installation was sanctioned by the Electrical Inspectorate as well, locating the panel board, transformers, generators etc as

shown in R3 (a) diagram. It is also stated from the part of the appellant that the entire installation is common for both the phases adding that, the sewage treatment plant is situated in the property coming under Phase II; though, it is also for the benefit of the owners of the apartments in Phase 1. Similarly, 90% of the swimming pool is stated as situated in the property coming within Phase II but common interest is provided to the occupants of both Phase I and Phase II, to have access and amenities in respect of the pool. Same is the position, with regard to the driveway and such other amenities. The observations of the Commissioner as contained in paragraph 4,5 and 6 of the report are in the following terms:

“4. the location of the panel room and generator are on the shed constructed from the eastern compound wall of the property in between Mystic Heights 1 and Mystic Height 2.

5. The Electrical panel room is seperated in the following order frok the southern side which lies from South to North. The first room from South is “ElectricalRoom- 1”:, second one is “Phase -1 Transformer” third one is “HT switch station” forth one is “Phase-II transformer” and thereafter fifth one is “STP plant and Generator”

6. The above said 11 KV power supply is connected to “HT switch station”. Two seperate units are provided on

either side of the HT connection unit to provide supply to the above said two transformers. The Asst. Executive Engineer present also verified and said that the connection is so far not provided though cable which is drawn from HT room to Phase - II transformer.

12. It is seen that some measurements have been done by the Commissioner from which it is inferred as stated in Paragraph 10, that HT Switch Station Transformer for Phase 1 and STP are situated in the land appurtenant to Mystic Height 1 and that generator is situated in the property covered by Mystic Heights 2. It is added that the measurement is not accurate and survey measurement is required to ascertain the correct boundary. This Court does not find it necessary to go into such minute aspects in so far as the issue is not with regard to the extent of undivided rights the purchaser is having over the property concerned or as to its value, but with regard to the right to have the necessary amenities which is sought to be provided with reference to the common benefits intended to be given. There is no dispute to the fact that the installation has already been effected by drawing the High Tension line from the road situated on the southern side, taking it to the place located in R3 (a), wherein the panel board is situated. There is also no dispute that, 'two outlets' are

provided in the panel board; one to the Transformer intended for Phase I and the other one to the Transformer exclusively intended for Phase II. The connection sought to be taken to Phase II is not from the Transformer which is allotted to Phase I, but from the second outlet of the panel board leading to the separate Transformer presently located within the premises of Mystic Heights 2 . This being the position, there is no chance for overlapping of the energy or syphoning out of energy from the common installation provided for Mystic Heights 1. It is also to be noted that the apprehension of the writ petitioner at the time of filing Ext.P5 complaint was that the work was being done by the Builder "to tap electricity" from the transformer planted for Phase I and that there was chance for pilferage of energy which was sought to be intercepted. As pointed out already, the same was enquired into by the authority of Board who conducted a spot inspection and has filed an affidavit before this Court to the effect that no such attempt was ever made from the part of the Builder. If there is any attempt from the part of the Builder or anybody else in this regard, it will of course amount to an offence under the relevant provisions of law, which can be easily rectified by the Board; more so when, the entire installation belongs to the Board.

13. An important aspect to be considered is whether this is a matter which is liable to be looked into or considered by the ADM invoking the power of Section 16 of Indian Telegraph Act. It is not a question of crossing of property belonging to two different owners, but the case of installation sought to be effected, providing necessary infrastructure separately intended for two separate units of Mystic Heights Phase 1 and Phase 2, making use of the structures and device erected in common, as sanctioned by the Electrical Inspectorate as shown in R3 (a) diagram. If there is any violation or deviation, it is within the reach of the Electrical Inspectorate and there is no such case either for the Board or for the parties concerned in this regard. The writ petitioner, in fact, had approached this Court without impleading any other parties who may be adversely affected, if at all the actual dispute was with reference to drawing of line involving "properly crossing" and pointing out the necessity to have the matter referred to the ADM under Section 16 of the Indian Telegraphy Act. The grievance was with regard to the callous inaction on the part of the Board in not acting upon Ext.P5 complaint with regard to the alleged tapping of electricity; thus seeking to justify non-impleading of other parties concerned. The factual position in this regard has been already answered against the petitioner, by virtue of the stand taken by the Board and the result of the spot inspection conducted by them.

14. The nature of relief sought for in the writ petition; particularly the prayers raised, are seen almost similar to the prayers raised by the very same party before the Civil Court by way of O.S.No.1005/2014, (with reference to prayers No. L and N). Undisputedly, no interim order was actually obtained in the interlocutory application filed before the Civil Court, with regard to the drawing of the electric line to Phase II. With regard to the disconnection of power supply to the premises of the plaintiff, it is to be noted that the petitioner did not make a mention as to the filing of O.S.No. 1005/2011 or as to the scope of the order if any, passed therein. Almost similar reliefs are prayed for in the writ petition and also in the civil suit particularly with reference to prayer no. L and N as mentioned already and as it was very much obligatory for the petitioner to have had revealed the entire facts and circumstances before this Court, which obviously has not been done. The non-mentioning of the said fact is of serious nature as it is an issue directly involved, with regard to the point to be considered by this Court. As a matter of fact, if relevant materials have suppressed, and pleadings and prayers are raised accordingly, it may even amount to 'Contempt of Court' in view of the law declared by the Apex Court on the point as reported **in AIR 1995 (3) SCC 757 of Supreme Court, Page 95 (Dhananjay Sharma v.State of Haryana)**. When the learned counsel is confronted

with regard to the factual position, it is stated that, the civil suit was filed by MH01A - Mystic Heights 1 Apartment Association, though a different office bearer; whereas, the writ petition came to be filed by Association represented by its Joint Secretary. Even though the officer bearers of the Association are different, the entity happens to be the same. More than that, we find that the name of the learned lawyer (Mr.P.P.Harris), who represented the party in both the proceedings, is one and the same. Mr.N.M.Madhu, the learned counsel, who argued before us on behalf of the respondents 1 and 2 submits, that the pleadings in the writ petition were settled on the basis of instructions given by the parties to him and that the pendency of O.S.1005/2011 or as to the nature of relief sought therein, were not properly brought to his notice, as the office bearer of the Association, who instructed the learned lawyer was different, and there might have been some communication gap in this regard.

15. We do not find any reason to doubt the version of the learned lawyer as to the course and events; we cant but, deprecate the conduct of the party concerned, who virtually has attempted this Court to take a ride. We find that this is not at all a fit case to call for interference and no direction ought to have been given in favour of the writ petitioner under any

circumstance, apart from the fact that, we do not find any merits as well.

16. In the above circumstance, the judgment dated 31.3.2015 in W.P.(C).2894/2015 stands set aside and the writ petition is dismissed. The writ petitioner is directed to pay a cost of Rs.25,000/- to the Mediation and Conciliation Centre, High Court of Kerala for having wasted the time of this Court; which shall be satisfied within one month. If there is any failure in this regard, it will be open to the Registrar General to issue necessary certificate to the beneficiary to have it realized by way of appropriate proceedings. A copy of this judgment shall be marked to the Director, Mediation & Conciliation Centre for information.

The appeal stands allowed.

P.R.RAMACHANDRA MENON
JUDGE

BABU MATHEW.P.JOSEPH
JUDGE

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