

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

MONDAY, THE 27TH DAY OF JULY 2015/5TH SRAVANA, 1937

WP(C).No. 17539 of 2009 (J)

PETITIONER(S):

U. DEVI, WIDOW OF LATE
V.S. PADMANABHANUNNI, RESIDING AT 'DIVYA',
PATTURAIKAL P.O., THRISSUR-1.

BY ADVS.SRI.K.K.CHANDRAN PILLAI,
SRI.A.S.SAJUSH PAUL,
SRI.THOMAS JAMES MUNDACKAL.

RESPONDENT(S):

1. THE ASST. EXECUTIVE ENGINEER,
ANTI WATER THEFT SQUAD,
KERALA WATER AUTHORITY, KOCHI-682 011.
2. THE EXECUTIVE ENGINEER, KERALA WATER AUTHORITY,
OLD THEVARA ROAD, KOCHI-682 016.
3. THE ASST. EXECUTIVE ENGINEER,
KERALA WATER AUTHORITY,
OLD THEVARA ROAD, KOCHI-682 016.
4. STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-1.

* ADDL. R5 IMPEADED

5. THE KERALA WATER AUTHORITY,
REPRESENTED BY ITS SECRETARY,
THIRUVANANTHAPURAM.

* IS IMPEADED AS PER ORDER DATED 14/08/2009 IN I.A. NO.10353/2009.

R1 TO R3 & ADDL. R5 BY ADV.SRI.MILLU DANDAPANI, SC.
R4 BY GOVT. PLEADER SRI.MANOJ P.KUNJACHAN.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 20/07/2015, THE COURT ON 27/07/2015 DELIVERED THE
FOLLOWING:

rs.

APPENDIX

PETITIONER'S EXHIBITS:-

- EXT.P1 COPY OF THE APPLICATION FOR DISCONNECTION OF WATER SUPPLY DATED 28/03/2006.
- EXT.P2 COPY OF THE COVERING LETTER DATED 01/06/2006 TO EXT.P1.
- EXT.P3 COPY OF THE REPRESENTATION DATED 26/09/2005 SUBMITTED BY THE PETITIONER AND HER CHILDREN TO 3RD RESPONDENT.
- EXT.P4 COPY OF THE MEMO FILED BY THE PETITIONERS BEFORE THE RENT CONTROL COURT, ERNAKULAM DATED 05/05/2009 IN RCP.2/2003.
- EXT.P5 COPY OF THE PROVISIONAL ASSESSMENT NOTICE DATED 06/06/2009 ISSUED BY THE 1ST RESPONDENT.
- EXT.P6 COPY OF THE PROVISIONAL ASSESSMENT NOTICE DATED 06/06/2009 ISSUED BY THE 1ST RESPONDENT.
- EXT.P7 COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER AND HER CHILDREN DATED 15/09/2005 TO 1ST RESPONDENT.
- EXT.P8 COPY OF THE BILL NO.754 DATED 24/02/2007 ISSUED BY THE 1ST RESPONDENT.
- EXT.P9 COPY OF THE PAPER PUBLICATION DATED 10/06/2009 IN THE MALAYALA MANORAMA.
- EXT.P10 COPY OF THE BILL ISSUED BY THE KERALA WATER AUTHORITY DATED 24/02/2007.
- EXT.P11 COPY OF THE BILL ISSUED BY THE KERALA WATER AUTHORITY DATED 02/01/2008.
- EXT.P12 COPY OF THE BILL ISSUED BY THE KERALA WATER AUTHORITY DATED 28/04/2008.
- EXT.P13 COPY OF THE COMPLAINT FILED BEFORE THE CORPORATION OF KOCHI DATED 23/02/2005 BY THE PETITIONER.

RESPONDENT'S EXHIBITS:-

- EXT.R1 COPY OF THE PROCEEDINGS OF SUPERINTENDING ENGINEER P.H. CIRCLE KWA KOCHI 05/07/2007.
- EXT.R1A COPY OF THE CONSUMER PERSONAL LEDGER IN RESPECT OF CONSUMER NO.29/1360/D GIVEN TO DOOR NO.29/1359.

- EXT.R1B COPY OF THE LAYOUT SHOWING DETAILS OF SERVICE PIPE, WATER METER, STORING, PUMPING & DISTRIBUTION POINTS AND TAMPERING OF SERVICE PIPE IN DIVYA BUILDING AND DIVYA COMPLEX PREPARED BY THE FIRST RESPONDENT.
- EXT.R1C COPY OF THE MAHAZAR DATED 06/06/2009 PREPARED BY THE FIRST RESPONDENT.
- EXT.R1D COPY OF THE MAHAZAR DATED 06/06/2009 PREPARED BY THE FIRST RESPONDENT IN RESPECT OF M/S.SRRLAKSHMI FAST FOOD AND BAKERY.
- EXT.R1E COPY OF THE PROVISIONAL NOTICE NO.AWTS/PA/064/09 DATED 06/06/2009 ISSUED BY THE FIRST RESPONDENT TO THE TENANT MR.B. RADHAKRISHNAN, M/S.SREELAKSHMI FAST FOOD AND BAKERY.
- EXT.R1F COPY OF THE REPORT NO.AWTS/PA-064, 065 & 066/09 DATED 10/06/2009 PREPARED BY THE FIRST RESPONDENT IN RESPECT OF M/S.SREELAKSHMI FAST FOOD & BAKERY.
- EXT.R1G COPY OF THE LETTER DATED 10/06/2009 SENT BY TENANT OF M/S.SREELAKSHMI FAST FOOD AND BAKERY TO THE FIRST RESPONDENT.

//TRUE COPY//

P.S. TO JUDGE

rs.

K. VINOD CHANDRAN, J.

W.P(C). No.17539 of 2009

Dated this the 27th of July, 2015.

JUDGMENT

The petitioner, the widow of one Padmanabhan Unni, is aggrieved with the provisional assessment notices issued by the Kerala Water Authority at Exts.P5 and P6. Late Padmanabhan Unni owned a large extent of property at Vyttila Junction, Ernakulam. Certain extent of the said property, along with the residential building thereon, was acquired by the State for the purpose of laying the National Highway. The said acquisition occurred long back prior to 1980 and is not relevant for the aforesaid case, but for the fact that the residential building, which also was acquired, had a water connection bearing No.29-1731/D. Subsequently in the year 1984, a three-storied building was constructed in the said property by Padmanabhan Unni, obviously for commercial purposes, since it was intended to be

rented out.

2. At the time when the construction was completed, Padmanabhan Unni is said to have applied for a water connection from the Corporation of Cochin. Subsequently in the year 1998, another commercial building was constructed in the said premises. The said building was not numbered by the Corporation, since Padmanabhan Unni, during his lifetime, was unable to satisfy the demand of one-time tax due on the building. The petitioner is said to have satisfied it after availing finance. In any event, admittedly there was no water connection to the said building. The commercial space in both the said buildings were rented out and the petitioner contends that after the death of her husband, the petitioner has not been able to access the said building. Rent Control Petitions are said to have been filed for eviction of the tenants, which had materialised much later.

3. On 06.06.2009, the Anti Water Theft Squad (AWTS) of the respondent KWA had conducted inspection in the premises, pursuant to which, Exts.P5 and P6 provisional assessment notices were issued. The learned Senior Counsel contends that, the

petitioner, an age-old lady, was unable to manage the affairs of the buildings and was totally unaware of the activities carried on therein. The petitioner apprehends that, the KWA did not disconnect the water connection to the residential building, which was situated in the land and acquired. The petitioner, along with her daughter and son, filed an application for disconnection of the water connection produced at Ext.P1. If the KWA had been prompt in effecting such disconnection, then the petitioner would not have been mulcted with the liability for illegal extraction of water from the pipes of the KWA, is the argument. The petitioner had also filed Ext.P3 complaint regarding the bill issued by the KWA, which has not been looked into by the authorities.

4. The learned Senior Counsel would further draw a distinction between the definition "consumer" and "owner" as defined under the Kerala Water Supply and Sewerage Act, 1986 [for brevity, the Act of 1986]. The argument is that, since tenants were in occupation, they are the consumers and the liability to water charges and for any unauthorised connections, when the property was in the possession of the tenants, is their

exclusive liability. It is also submitted that, with respect to one of the bills, a tenant had been in unauthorised occupation of certain space within the building and KWA also was aware of the same. The liability, as to the unauthorised drawing of water connection as also for the water charges, can only be proceeded against the tenant. It is also submitted that the tenant had been proceeded against, but later, the same kept in abeyance and proceedings initiated against the petitioner herein. The learned Senior Counsel would make much of the fact that the KWA had been unnecessarily harassing the petitioner, an age-old widow, who has been residing alone in Thrissur and who had not been in actual possession of the building.

5. The KWA has filed a detailed Counter Affidavit producing the lay out of the service connection and the plumbing within the buildings as also the Mahazar prepared and the report given by the Officer, Anti Water Theft Squad (AWTS), who conducted inspection of the premises. The learned Standing Counsel appearing for the KWA would at the outset contend that what is challenged herein are the provisional assessments and

finalisation is still pending consideration of the KWA. The water connection, which was existing in the acquired building, according to the KWA, has already been disconnected. Hence, there are no proceedings pending as against 29-1731/D, the water connection earlier provided to the acquired building.

6. The three-storied building in the property, said to have been constructed in 1984, had a water connection bearing No. 29-1360/D. The meter installed in the premises, with respect to that connection, was also found to be in working condition. However, the water flow to the meter was blocked with a cloth and water was diverted with a 'T valve', directly from the supply pipe of KWA; ensuring that the water drawn for use was not recorded by the meter. The said connection was again a domestic connection and Ext.P6 has been issued by the KWA, for wrong categorisation of the connection as a domestic connection; while in fact the supply catered to a commercial building. Ext.P5 was with respect to the other building, which had no authorised supply from KWA; but water was drawn from the connection 29-1360/D, but through two overhead tanks placed on the top of the

two buildings.

7. Admittedly, the second building constructed in the property after the acquisition, did not have a water connection and the unauthorised water supply to the said building was drawn from the connection having consumer No.29-1360/D; which was the subject matter of Ext.P5. Ext.P5 is a proceeding initiated under Section 46B of the Act of 1986 for unauthorised use of water, while Ext.P6 is a proceeding initiated under Section 39 of the Act of 1986 for wrong categorisation of the connection as a domestic one, while it catered to commercial use, to which the building was put. The learned Standing Counsel would also urge that, there is absolutely no merit in the contention that an old lady was harassed, since the son-in-law of the petitioner was always in charge of the affairs of the building and the proceedings were taken, with notice to the petitioner.

8. The contention raised on the ground of the distinction between the definitions of 'consumer' and 'owner' cannot be countenanced. The owner in relation to the premises is *inter alia* the person, who receives rent of that premises. The petitioner,

admittedly, was a co-owner, who was receiving rent from the premises as admitted in the writ petition. Despite the disputes with the tenants, it is an admitted fact that the tenants were put in possession by the petitioner's deceased husband or the petitioner herself. On the death of the husband, the premises is said to have devolved on the petitioner and her children. The petitioner's specific averment in the writ petition is that, an employee of one of the tenants used to collect the rent from the tenants and deposit it in her account. The petitioner's averments also indicate that the affairs of the buildings were enquired through the son-in-law of the petitioner, who was also prosecuting the rent control cases before that Court. Hence, there can be no doubt that the petitioner is an owner as defined under the Act. The question to be dealt with is whether the definition of 'consumer' excludes an owner and only takes in a person, who is in possession of the premises.

9. Reading of the definition of 'consumer' does not commend such a conclusion. 'Consumer' is any person getting the benefit of water supply or waste water service from the

authority. The enduring benefit of the water supply is to the building and hence to the building owner. The fact that the building owner has put a tenant in occupation of the building, does not detract from the fact that the owner also benefits from the water supply. Further, the owner is shown as the consumer in the records of the Kerala Water Authority and the definition includes the tenant in occupation also. Hence, within the definition of a 'consumer', the owner and the tenant would be brought in. A tenant, who consumes and gets benefit of the water supply would also be liable to be proceeded against for recovery of the charges or for a proceeding for any violation of the provisions of the Act and the Rules framed thereunder. Further there is yet another definition provided at sub-clause 16 of Section 2(1) for 'occupier', which includes a tenant, the owner, a licensee or any other person, who is in occupation of the building. Hence, it cannot be said that on a tenant being put in possession, the owner is absolved from the liability to the water charges or any proceedings taken for violation of the provisions of the Act and the Rules. The liability then would be joint and several.

10. While dealing with the above contention, it is also to be noticed that the petitioner does not anywhere assert that she is the sole owner of the premises. The premises were owned by the deceased Padmanabhan Unni and in the normal course, on his death, in the absence of a specific bequest, the property should devolve upon the wife and children. The petitioner has two children, who have joined together with the petitioner to seek for disconnection before the KWA and also to challenge the proceedings initiated by the KWA. Ext.P1 application for disconnection is made on behalf of the legal heirs of late Padmanabhan Unni being the petitioner and her daughter K.P Lakshmi Devi and son K.P. Narayanan. Ext.P2 notice is issued again by the legal heirs and so is Ext.P3 complaint. It is also very evident that the Rent Control Petition was filed by the legal heirs of late Padmanabhan Unni, which is evidenced by Ext.P4. Hence, the contention that the KWA is harassing the petitioner, an age-old widow, is merely a ruse to get the sympathy of the Court.

11. Even if the petitioner alone was managing the affairs of the building, the Rent Control Petition itself was filed by all the

legal heirs. The petitioner and other co-owners cannot escape from the liability, on the mere contention that the tenants were in occupation of the building. The responsibility to see that the water charges are paid and that the provisions of the Act of 1986 are not violated, was primarily on the owners of the building; who had themselves or their predecessor-in-interest, put tenants in occupation of the various rooms. The contention that the owners were prevented from entering the building cannot at all be countenanced, since nothing is produced to substantiate the same. Disputes between the tenants and the landlord cannot always lead to such exclusion of the owners from the premises and if at all, then the owners ought to have taken appropriate proceedings to ensure that the tenants, do not violate any of the statutory mandate with respect to the building or the public utility services taken for the said building. However, that is not to say that the tenants are not liable. The tenants too, who were in occupation would be equally liable and the liability to the penal proceedings as also for assessment of water charges and penalty, would be joint and several, going by the separate definitions of

“consumer”, “occupier” and “owner” in the Act of 1986. The KWA in the context of a joint and several liability could proceed against all or any of these persons.

12. As has been stated by the KWA, the connection to the old building, which was acquired and had consumer No.29/1731/D, has been disconnected. The specific notices were to the two buildings constructed later to the acquisition, which are described by the owners themselves as building No.1 and building No.2, in their complaint at Ext.P3. Building No.1 had rooms numbered 29/1358 to 29/1364 and building No.2 had rooms numbered 29/1364J to 29/1364A. Different tenants were in occupation of the rooms in the said buildings. Building No.1 had a water connection bearing No.29/1360 D. The said water connection was taken before the coming into force of the Act of 1986, according to the petitioner in the year 1984, that too from the Corporation. The Water Authority does not dispute such contention. But however it is pertinent that despite the Act of 1986 having come into force, the owners had not attempted to change the categorisation from domestic connection to

commercial connection. Ext.P6 is a provisional bill issued with respect to building No.1, which indicates that the connection was drawn as a domestic connection, while the use was of a non-domestic purpose, being a commercial purpose. The use for commercial purpose cannot be disputed by the petitioner, since the tenants were in possession of the building and were using the water thereon. Ext.P5 is with respect to the second building, which is also one tenanted out and which admittedly did not have a water connection.

13. A perusal of the lay out plan and Mahazar would indicate the manner in which water was unauthorisedly drawn to the building, which did not have a water connection. The lay out details of the connection has been given in Ext.R1(a). 'Divya Building' would be building No.1 and 'Divya Complex' building No.2. Building No.1, as was indicated above, had a water connection, from which water was drawn again through a diversion and not recorded through the meter. The water so drawn unauthorisedly was collected in an overhead tank on top of the building. From the overhead tank kept in building No.1, a

connection was drawn to another overhead tank on building No.2, through which supply of water was effected to building No.2; which did not have an authorised supply. Hence, the water was drawn from one connection without recording the same in the meter and the said water was used for the purposes of both the buildings, one of which did not at all have a water connection. The infrastructure; of the water tanks and the connections drawn would belie the contention of the owners that they were unaware of such connection having been taken by the tenants. The definition as noticed above make the owners and tenants jointly and severally liable. The Water Authority cannot be directed to confine the recovery or penal proceedings against the tenants.

14. The owners definitely would have a remedy of recovery from the tenants. But however in a properly initiated civil proceedings, in which they would have to prove that the tenants were in occupation and were responsible for the misuse of the water against the provisions of the Act and Rules. So should the penal proceedings, if any initiated by the Kerala Water Authority be defended, if so advised.

15. There are serious disputes raised on Ext.R1(f), wherein photographs are annexed, to contend that the same is a Mahazar without any witnesses. The said contention cannot be accepted, because the Mahazar itself is at Exts.R1(c) & R1(d), where the witnesses, being the officers of the KWA had signed the same. There is no provision in the Act or Rules, which mandate an inspection in the presence of independent witnesses. Ext.R1(f) is only a report of the Assistant Executive Engineer, AWTs to the Superintending Engineer clearly showing the manner in which the water was misused. The contention with respect to violation of principles of natural justice also cannot be countenanced. It is futile to contend that the AWTs should have conducted the surprise inspection with notice. Then the element of surprise is lost and the exercise of detecting water theft would be frustrated.

16. Subsequently, the provisional notices were issued to the son-in-law who had been all along representing the cause of the co-owners before the KWA. The petitioner's reply-affidavit that she had not authorised anybody nor conferred a power-of-attorney goes against her own contentions in the writ petition

and the earlier part of the reply affidavit. The petitioner in the very same paragraph (14) of the reply, asserts that the provisional assessments were served on the son-in-law, pursuant to a telephonic message; which the son-in-law received when he was preparing to go to the premises with the lawyer conducting the rent control cases.

17. One other contention raised by the petitioner is the inability of the KWA to make any assessment of water charges for the previous periods. The provisional assessment orders produced at Exts.P5 and P6 indicate that they have been issued under Sections 39, 40A, 42, 46C and 46D of the Act of 1986. Section 39 specifically prohibits use of water supplied for domestic purposes; for non-domestic purposes. Section 40A would not be applicable, since it refers to punishment for illegal use of public hydrants. Section 42 is the provision for water meters, which mandate is on the consumer, which includes the owner also. Section 46B refers to punishment for tapping or making illegal connections, which takes in any person, who with the intend to draw water, taps or makes or causes to be made

any connection from mains or service pipes of the KWA, without obtaining prior permission. Section 46C is for the punishment for other illegal activities mentioned therein, which however is confined to any person, who is a consumer.

18. Section 46D deals with assessment of water charges in the case of unauthorised use. The said provision confers power on the authority to assess the water charges to the 'best of judgment', for unauthorised use of water detected. The provision also contemplates a procedure, by which a provisional assessment is made and then, the same is concluded after hearing the persons on whom such notice is issued. Sub-section (5) also provides on disclosure of unauthorised use, the same shall be deemed to have commenced from the date so found by the Assessing Officer.

19. In such circumstances, it cannot be said that the authority has no power to assess the water charges for any previous period. The principles of 'best judgment' are trite and needs no reiteration. The off-quoted decision of the Hon'ble Supreme Court in **Commissioner of Sales Tax, Madhya**

Pradesh v. H.M. Yusuf Ali [(1973) 2 SCC 137] is apposite for reference here. That estimation on 'best judgment' necessarily involves an amount of guess work was accepted by the Hon'ble Supreme Court, but however with a caution that the authority cannot act in a manner, which is vindictive or capricious. The availability of materials to determine the quantum of estimation was held to be unnecessary and the only mandate is that the estimation should be on a rational basis, having nexus with the allegation. Definitely, there should be something more than a mere suspicion. Though, the principles were stated in the case of estimation under the taxation enactments, the same is equally applicable herein.

20. It cannot at all be said that the authority has proceeded on a mere suspicion. A surprise inspection was conducted. The violation of provisions were clearly found and reduced to a Mahazar, which is also witnessed by the Officers of the authority. Provisional assessment has been threatened on the basis of an estimation, which definitely the owners/consumers/ occupiers of the property would be entitled to object to before the authority.

The challenge made by the petitioner on the ground of the petitioner being an old-aged widow has been already found to be unsustainable, especially since there are other co-owners of the property, who have deliberately kept away from challenging the provisional bill issued by the Kerala Water Authority, so as to facilitate such a contention before this Court. There can be no *certiorari* issued against Exts.P5 and P6, since this Court does not find any infirmity or illegality in the provisional assessment made, which definitely has to be finalised only after hearing the owners of the property.

21. The other relief prayed, for conducting a proper enquiry with notice to the petitioner and her children again commend all the three joint owners to be heard. This Court cannot find that the provisional bills have been issued without any proper enquiry. Site inspection was conducted which require no notice and the son-in-law of the petitioner is said to have been specifically informed of the same and he was served with the assessment notices. If the other owners are keeping away from such proceedings, then it is at their risk and the proceedings cannot at

all be termed to be one behind their back.

22. A reading of the Mahazar prepared does not commend any interference to the proceedings initiated. The provisional assessment is bad only for the reason that it threatens imposition of a fine, which the Assessing Officer does not have power to do, as per the Act of 1986. A penalty by way of fine is contemplated only under Section 46B, which can be imposed only on conviction and that too by the Court entitled to take cognizance of the offence. The provisional assessment to that extent; ie. for imposition of fine is set aside. However Regulation 14(b) of the Kerala Water Authority (Water Supply) Regulations, 1991 levies 2% interest per month for the water charges defuncts.

23. The observations of this Court need not be taken as one sustaining the estimation proposed in the provisional assessment, which is a matter to be considered by the authority after giving an opportunity to the owners/consumers/occupiers. However it is not as if all or each of them have to be proceeded against to sustain it against any of them, since the liability is joint and several. The owner/consumer, who has the primary responsibility

to the Kerala Water Authority, could very well seek for recovery from their tenants, who were put into occupation by them and could also defend any prosecution initiated, on the ground of they having not been involved in the specific allegation of unauthorised tapping of water, revealed on inspection.

24. The writ petition would stand dismissed with a direction to the respondent authority to intimate the petitioner and the other co-owners, the basis on which the estimation is proposed in addition to the provisional bills issued at Exts.P5 and P6. The respondent shall also permit the co-owners to file an objection, which shall be considered and finalised after affording an opportunity of hearing to such co-owners. The limitation for any prosecution, intended, would start from the date of receipt of certified copy of this judgment, since the same was stayed by this Court by an order dated 24.06.2009.

25. However, taking into consideration the overall circumstances it is directed that if the petitioner or any of the co-owners satisfy the following conditions within a month from the date of receipt of a certified copy of this judgment, the

respondents shall conclude all proceedings, including prosecution steps against the petitioner and the other co-owners:

i) Pay the amounts demanded as per Exts.P5 & P6, but for the fine imposed, with interest @ 6% simple interest from 01.07.2009 till date of payment.

ii) Pay an amount of Rs.50,000/- (Rupees Fifty thousand only) in lieu of penalty that could be imposed on prosecutions initiated in lieu of Exts.P5 & P6 under Section 46B(ii).

The respondent authorities can immediately initiate proceedings as directed herein above and continue the same if the above payments are not made within the time specified.

Sd/-
K. VINOD CHANDRAN,
JUDGE

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