

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN**

**TUESDAY, THE 13TH DAY OF JANUARY 2015/23RD POUSHA, 1936**

**WP(C).No. 24712 of 2012 (L)**  
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**PETITIONER :**  
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**MONCY DANIEL, AGED 45 YEARS, S/O.DANIEL,  
PANACHOOR HOUSE, MULLACKAL WARD,  
ALAPPUZHA.**

**BY ADVS.SRI.K.S.HARIHARAPUTHRAN  
SRI.M.D.SASIKUMARAN  
SRI.GEORGE MATHEW  
SRI.DIPU JAMES  
SRI.K.P.UNNIKRISHNAN (ELOOR)**

**RESPONDENTS :**  
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**1. ALAPPUZHA MUNICIPALITY  
REPRESENTED BY ITS SECRETARY, MUNICIPAL OFFICE  
ALAPPUZHA-688001.**

**2. SECRETARY  
ALAPPUZHA MUNICIPALITY, ALAPPUZHA-688001.**

**3. M.A.MUHAMMED KUNHU  
S/O.N.M.ABDUL SALAM, NARANJI (H)  
COMMERCIAL CANAL SOUTH BANK ROAD,  
CIVIL STATION WARD, ALAPPUZHA-688001.**

**R1 & R2 BY ADV. SRI.AZAD BABU, SC, ALAPPUZHA MUNICIPALITY  
R3 BY SRI.N.NANDAKUMARA MENON SENIOR ADVOCATE  
R3 BY ADVS. SRI.P.K.MANOJKUMAR  
SMT.HENA BAHULEYAN**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD  
ON 13-01-2015, THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING:**

**bp**

**APPENDIX**

**PETITIONER'S EXHIBITS :**

- P1: COPY OF CONSTRUCTION PERMIT DT 17/8/2005.**
- P2: COPY OF THE ORDER NO. E5-16212/09 DT 20/8/2009.**
- P3: COPIES OF BUILDING TAX RECEIPT.**
- P3(A): COPIES OF BUILDING TAX RECEIPT.**
- P3(B): COPIES OF BUILDING TAX RECEIPT.**
- P4: COPY OF THE ADV. COMMISSIONER'S REPORT DT 23/7/2012.**
- P5: COPY OF THE JUDGMENT DT 28/2/2012 IN WPC NO. 15621 OF 2010.**
- P6: COPY OF THE NOTICE DT 29/3/2012.**
- P7: COPY OF THE ORDER DT 16/7/2012.**
- P8: COPY OF THE OBJECTION DT 30/7/2012.**
- P9: COPY OF NOTICE NO. E5-12498/06 DT 29/9/2012.**
- P10: COPY OF THE ORDER NO. E5-126/05-06 DT 19/9/2012.**

**RESPONDENT'S EXHIBITS :**

- EXT.R3(A): COPY ORDER NO. E5-126/05-06 DT 19/9/2012 ISSUED BY THE SECRETARY IN CHARGE, ALAPPUZHA MUNICIPALITY.**
- EXT.R3(B): COPY OF THE JUDGMENT DT 12/10/2012 IN WPC NO. 21207 OF 2012 (A) PASSED BY THE HON'BLE COURT OF KERALA, AT ERNAKULAM.**

**//TRUE COPY//**

**P.S. TO JUDGE**

**bp**

K. SURENDRA MOHAN,J.

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W.P(C) NO.24712 OF 2012  
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Dated this the 13<sup>th</sup> January, 2015.

### JUDGMENT

The petitioner has filed this writ petition challenging Ext.P10 order of the second respondent by which he has been directed to demolish portions of a commercial building put up by him. The third respondent is a person who is residing on the western side of the petitioner's property. He had approached this Court by filing WPC No: 15621/2010 complaining that, the construction of the petitioner was being carried on in violation of the Kerala Municipality Building Rules, 1999 (the 'Rules' for short). It was also alleged that though he had submitted complaints to the second respondent regarding the construction of the petitioner, no action was taken thereon. The said writ petition was disposed of by Ext.P5 judgment directing the second respondent to

consider the complaints of the third respondent and to pass appropriate orders thereon within the time stipulated therein.

2. Pursuant to Ext.P5, the second respondent passed a provisional order under Section 406 of the Kerala Municipality Act, 1994 (the 'Act' for short) on 16.7.2012. The petitioner was directed to submit his objections to the said order, Ext.P8. Accordingly, the petitioner submitted his objections. Thereafter, as per Ext.P9 notice dated 29.9.2012 the petitioner was directed to attend a hearing before the second respondent on 4.10.2012. Accordingly the petitioner was heard. However, by Ext.P10 order the second respondent has confirmed the provisional order Ext.P8 and has directed demolition of portions of the petitioner's building. The petitioner is aggrieved by the same.

3. According to Adv.K.S.Hariharaputhran who appears for the petitioner the final order Ext.P10 is dated 19.9.2012 whereas, on 29.9.2012 the petitioner had been issued with Ext.P9 communication directing him to attend a hearing on

4.10.2012. Ext.P10 refers to the hearing that was conducted on 4.10.2012 as reference No:5. However, since the order bears a date much anterior to the date of hearing that was conducted, it is contended that Ext.P10 is bad for non-application of mind. Though Ext.P7 argument notes was submitted by the petitioner, it is contended that the contentions raised have not been considered by the second respondent. It is further pointed out that, as per Ext.P5 this Court had directed the second respondent to consider the reports of the Building Inspector specifically referred to therein. However, in disregard to the direction of this Court Ext.P10 has been issued without even referring to the said documents. For the above reasons it is contended that Ext.P10 is liable to be set aside.

4. The learned Senior Counsel Shri. N.Nandakumara Menon who appears for the third respondent opposes the contentions of the counsel for the petitioner. It is pointed out by the counsel that as soon as the construction commenced, it

was noticed that the same was being carried on in violation of the Building Rules. Though a stop memo had been issued against the same by the second respondent, as early as on 23.9.2011, the construction was carried on by the petitioner with impunity. According to learned the Senior Counsel, if the approved plans are called for the same would reveal that, constructions that do not find a place therein have been effected on the western side causing serious prejudice to the life of the third respondent and his family. The third respondent, according to the counsel, is residing therein with his family. It is also pointed out by the counsel that the date in Ext.P10 can only be a mistake for the reason that the petitioner has admittedly been heard on 4.10.2012, reference of which has been made as serial No:5 in the said order itself. Another copy of the order that bears the dated signature of the second respondent is relied upon to contend that the order was actually issued on 5.10.2012. The said document has been produced as Annexure R3(a) in I.A.17048/2012.

Reliance is also placed on Ext.R3(b) judgment where Ext.P10 order has been referred to by me while disposing of WPC 21207/2012 filed by the third respondent as an order dated 19.9.2012 but signed and issued on 5.10.2012. On the basis of the above, it is contended that the discrepancy can only be attributed to an inadvertent mistake. The counsel for the petitioner however hastens to point out that the signature in Ext.P10 does not bear a date whereas Ext.R3(a) shows a date leading to doubts regarding the point of time at which the date could have been affixed.

5. Apart from the above, it is pointed out by the learned Senior Counsel that Ext.P10 being a final order passed under Section 406(3) of the Act is appealable to the Tribunal for Local Self Government Institutions, Thiruvananthapuram under Section 509(6) of the Act. The said equally efficacious alternative remedy not having been exhausted by the petitioner, the writ petition is not maintainable. Adv.Azad Babu who appears for respondents 1 and 2 also advances

more or less the same contentions as the learned Senior Counsel.

6. Heard. As per Ext.P5 judgment, this Court has disposed of WPC 15621/2010 with the following directions:-

“I therefore direct the second respondent Secretary to consider Exts.P3, P4, P13, P14 and P15 submitted by the petitioner as well as Ext.R3(h) submitted by the third respondent. The reports of the Building Inspector dated 3.8.2010 as well as 5.3.2011 shall also be considered by the second respondent Secretary in addition to the Commissioner's report dated 15.7.2010. Final orders should be passed in this regard after hearing all affected parties within a period of six weeks from the date of receipt of a copy of this judgment.”

As per the above direction, the second respondent should have passed an order after considering the reports of the Building Inspector dated 3.8.2010 as well as 5.3.2011 that are specifically referred to in the direction. In addition, the Commissioner's report dated 15.7.2010 was also directed to

be considered. Final orders were to be passed after hearing all affected parties within a period of six weeks from the date of receipt of a copy of the judgment. However, a perusal of Ext.P10 does not show that either the reports of the Building Inspector referred to in the judgment or the Commissioner's report dated 15.7.2010 were considered by the second respondent. There is also no reference to the contentions advanced on behalf of the petitioner at the hearing that is alleged to have been conducted on 4.10.2012. The second respondent ought to have referred to the contentions and stated why the said contentions were not acceptable. Considered in the above context, the discrepancy in the date borne on Ext.P10 and the date of hearing which is subsequent to the said date also assumes significance. It is clear that, the impugned order Ext.P10 has not been passed in compliance with the direction contained in Ext.P5. Since the contentions advanced by the petitioner at the time of hearing have not been considered or even referred to in Ext.P10, it has

to be held that the principles of natural justice are violated. It is settled law that where principles of natural justice are violated an alternative remedy is not a bar against maintaining a writ petition under Art.226 of the Constitution. For the above reasons I find that this writ petition is maintainable and that Ext.P10 cannot be sustained. Though the tenability of the objections against the construction that has been made by the petitioner has also been referred to in detail, I refrain from considering the said contentions herein for the reason that, they are to be considered by the second respondent on the merits. It is therefore only appropriate that the second respondent considers the matter afresh in compliance with the direction contained in Ext.P5 and passes fresh orders. However, considering the fact that the issue has been pending since 2011, it is absolutely necessary that final orders are passed in the matter, expeditiously.

In view of the above:

i) This writ petition is allowed. Ext.P10 is set aside.

ii) The second respondent is directed to afford a fresh opportunity of being heard to the petitioner as well as the third respondent, to consider the objections of the petitioner to Ext.P8 provisional order in the light of the reports of the Building Inspector dated 3.8.2010 and 5.3.2011 as well as Commissioner's report dated 15.7.2010 in WPC 15621/2010 as directed in Ext.P5 judgment and to pass appropriate orders in the matter in accordance with law, as expeditiously as possible and at any rate within a period of four weeks of the date of receipt of a copy of this judgment.

iii) The petitioner shall not effect any further construction until final orders are passed by the second respondent in accordance with the above direction.

Sd/-  
K. SURENDRA MOHAN  
Judge

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/True copy/

