

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE SMT. JUSTICE P.V.ASHA

THURSDAY, THE 9TH DAY OF JULY 2015/18TH ASHADHA, 1937

WP(C).No. 34149 of 2014 (P)

PETITIONER:

SUSAMMA LUKE, AGED 77 YEARS
W/O.LATE K.Y.LUKE, PLOT NO.51, SANKAR NAGAR
CHINNAKKADA, KOLLAM.

BY ADV. SRI.M.SREEKUMAR

RESPONDENTS:-:

1. CORPORATION OF KOLLAM,
REPRESENTED BY SECRETARY, CORPORATION OFFICE, KOLLAM.

2. SECRETARY,
CORPORATION OF KOLLAM, CORPORATION OFFICE, KOLLAM.

3. GLATIA BALAKRISHNAN,
HOUSE NO.S-50, SANKAR NAGAR, CHINNAKKADA
KOLLAM.

ADDL.4. KERALA STATE HOUSING BOARD,
REPRESENTED BY THE SECRETARY,
OFFICE OF THE KERALA STATE HOUSING BOARD,
THIRUVANANTHAPURAM-695 001.

(ADDL.R4 IS IMPEADED AS PER ORDER DT.12.2.15 IN I.A.2084/15)

R3 BY ADV. SMT.D.P.RENU
R1,R 2 BY SRI.M.K.CHANDRA MOHAN DAS,SC,KOLLAM MUNICIPALITY
RADDL.4 BY ADV. SRI.GEORGE BOBAN, SC, K.S.H.B.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 09-07-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

EXHIBIT P1. TRUE COPY OF SALE DEED NO.565/1993 OF SUB REGISTRY OFFICE, KOLLAM DATED 17.02.1993.

EXHIBIT P2. TRUE COPY OF TAX RECEIPT NO.1314249 DATED 25.05.13 ISSUED FROM THE VILLAGE OFFICE, KOLLAM.

EXHIBIT P3. TRUE COPY OF THE ORDER IN OP NO.386/2001 DATED 20.06.2001 OF THE OMBUDSMAN FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM.

EXHIBIT P4. TRUE COPY OF NOTICE NO.PW2/39860/10 DATED 12.09.2011 ISSUED BY THE 2ND RESPONDENT.

EXHIBIT P5. TRUE COPY OF THE PHOTOGRAPH SHOWING THE BUILDINGS OF PETITIONER AND 3RD RESPONDENT.

EXHIBIT P6. TRUE COPY OF THE PHOTOGRAPH OF BUILDING OF PETITIONER AND THE ADJACENT DRAIN.

EXHIBIT P7. TRUE COPY OF THE PHOTOGRAPH SHOWING THE BUILDINGS OF PETITIONER AND 3RD RESPONDENT.

EXHIBIT P8. TRUE COPY OF THE PHOTOGRAPHS SHOWING THE CLOSE UP VIEW OF THE DRAIN.

EXHIBIT P9. TRUE COPY OF REPLY FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.

EXHIBIT P10. TRUE COPY OF NOTICE NO.PW2/39860/10 DATED 20.03.13 ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER.

EXHIBIT P11. TRUE COPY OF REPLY FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT DATED 02.04.2013.

EXHIBIT P12. TRUE COPY OF NOTICE NO.PW2/39860/10 DATED 06.05.2013 ISSUED BY THE 2ND RESPONDENT TO PETITIONER.

EXHIBIT P13. TRUE COPY OF APPEAL MEMORANDUM IN APPEAL NO.501/13 FILED BY PETITIONER BEFORE THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS, TVM, WITHOUT ANNEXURES.

EXHIBIT P14. TRUE COPY OF STATEMENT FILED BY THE 2ND RESPONDENT IN APPEAL NO.501/2013 BEFORE THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM DATED 08.10.2013.

EXHIBIT P15. TRUE COPY OF STATEMENT FILED BY THE 3RD RESPONDENT IN APPEAL NO.501/2013 BEFORE THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM DATED 05.11.2013.

EXHIBIT P16. TRUE COPY OF THE ORDER DATED 17.07.14 IN APPEAL NO.501/2013 OF THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM.

EXHIBIT P17. TRUE COPY OF ORDER NO.PW2/39860/10 DATED 20.11.2014 OF THE 2ND RESPONDENT.

WP(C).No. 34149 of 2014 (P)

: 2 :

EXHIBIT P18. TRUE COPY OF LETTER NO.Q/25/81/II DATED 25.5.2013 ISSUED BY THE EXECUTIVE ENGINEER, KSHB, KOLLAM DIVISION TO LAISON OFFICER, KSHB, REGIONAL OFFICE, PANAMPALLY NAGAR.

EXT.P18(a). TRUE COPY OF ENGLISH TRANSLATION OF EXT.P18.

3RD RESPONDENT(S) ' EXHIBITS

EXT.R3(a): TRUE COPY OF PLAN OF THE LOCATION.

2ND RESPONDENT'S EXHIBITS

EXT.R2(1): TRUE COPY OF THE LETTER NO.12731/W&CWC.A2/01/LEG. DATED 28.10.2008.

EXT.R2(2): TRUE COPY OF THE SITE AND LOCATION PLAN.

EXT.R2(3): TRUE COPY OF THE LETTER DATED 3.4.07.

/TRUE COPY/

P.S TO JUDGE

P.V.ASHA, J.

W.P(c) No.34149 of 2014-P

Dated this the 9th day of July, 2015

JUDGMENT

The challenge in this Writ Petition is against Ext.P17 order by which the Secretary of Kollam Corporation directed the petitioner to remove the obstruction illegally made on the northern part of the drain and to restore the drain in its original position with a length of 6 meters towards west, within her compound wall. It was also warned that coercive action will be taken for removal of the obstruction in the event of any failure on the part of the petitioner for restoration of the drain.

2. The petitioner is challenging the authority of the Secretary of the Corporation to issue such direction, saying that the drain is in her property and is covered by Ext.P1 sale deed. According to the petitioner, the drain is owned by her and she is having every freedom to use it without any interference by the Municipality or by any others.

3. The facts leading to Ext.P17 order, as per the pleadings of the petitioner are as follows: The petitioner is the

owner of 11 cents and 900 sq.meters of property, along with a residential building therein. The said building was allotted by the Kerala State Housing Board, initially on the basis of an agreement executed in the year 1981 and thereafter on the basis of Ext.P1 sale deed dated 17.02.1993. At that time there was a drainage system in the property of the petitioner. The petitioner asserts that the title of the said drain, along with the property, is vested in her by virtue of Ext.P1 sale deed, on the strength of the following recitals in the sale deed:

“The Board doth hereby convey transfer and assign by way of absolute sale into the party of the second part, ALL THAT piece of land, hereditaments and premises more particularly mentioned and described in the schedule annexed hereto together with all **water drainage** and electric connections thereon and all the trees and other improvements and all other things contained therein and all the rights, title and interest and other claims and demands whatsoever of the Board in and upon the same.....”

(emphasis supplied)

4. It is stated that the property of the petitioner was lying in low level compared to other properties adjacent to that of her. She is residing in plot No.51 and the 3rd respondent is residing on the eastern side of her property in plot No.50. The

petitioner says that the 3rd respondent filed a complaint before the Ombudsman for Local Self Government Institutions alleging that there was water drainage on the northern side of her property situated outside the compound wall constructed by the Housing Board. It was alleged that the petitioner demolished the compound wall and constructed a new one encroaching on the water drainage owned by the Board. It is stated that on production of the title deed, the Ombudsman closed the complaint of the 3rd respondent, recording the document under which the said property was registered. The dispute between the petitioner and the 3rd respondent was found to be a civil dispute and therefore the Ombudsman observed that the Municipality cannot interfere in such cases and the O.P was closed accordingly. The petitioner says that even after the rejection of petition of the 3rd respondent, she continued to make complaints before various authorities. By Ext.P4 memo, the Corporation directed the petitioner to demolish the compound wall constructed over the drain allowing free flow of water through the drainage. The notice was issued on the basis of a complaint of the 3rd respondent and after getting a report on the complaints cited as reference No.(2) in Ext.P4. Producing

the photographs of the property, the petitioner states that there is a public drainage system provided along the side of the road and outside the compound wall of all the plots. The petitioner says that the drainage which the petitioner has reconstructed is the one covered by Ext.P1 title deed and the Corporation does not have any right over it. She has produced Ext.P9 representation before the Corporation in which she stated that the compound wall of her house was constructed by the Housing Board years before and because of the adjoining residential buildings, no reconstruction is possible. In this representation, it is also pointed out that there is a drainage on the western side of her plot which was constructed by the Housing Board 30 years back, which leads to a backwater along plot No.41 in the rear side of her house in Sankar Nagar Park through Pullikkada Colony. It is submitted that the 3rd respondent does not have any right over her drainage and obstructions will not be caused since drainage is there in front of each and every plot. According to her, her plot consists of a building with 481.45 sq.feet area along with drainage, as stated in Ext.P1 title deed. Therefore she informed the Corporation that complaints have been preferred against her only because of the fact that the 3rd respondent is in

inimical terms with her. The Corporation again sent a notice to the petitioner on 20.03.2010 as per Ext.P10 requesting her to demolish the existing compound wall allowing free flow of water after leaving the drainage outside the compound wall. The petitioner continued to furnish representations and the Corporation also continued to issue notices. In response to Ext.P10, the petitioner furnished reply Ext.P11 and the Corporation issued Ext.P12 notice dated 06.05.2013 directing her to demolish the compound wall constructed over the drainage, within a period of 7 days, failing which the Municipality will demolish the same, under Section 538 (A) of the Municipalities Act.

5. As against the said order the petitioner had filed an appeal Ext.P13 before the Tribunal for Local Self Government Institutions, Thiruvananthapuram. The Tribunal, after considering the issue with reference to the objections of the Municipality as well as the 2nd respondent and after perusing the files of the Municipality, found that the title deed Ext.P1 would show that the water drainage and electric connection thereof with building are transferred in favour of the petitioner. The Secretary of the Corporation had, on the strength of a letter

dated 18.11.1992 of the Housing Board, stated that at the time of construction of the compound wall around plot No.51, the drainage was fully offside the plot and the petitioner reconstructed the compound wall putting the drainage inside the compound wall. The case of the 2nd respondent therein was that the petitioner, reconstructed the compound wall by encroaching upon the drainage system situated in front of the house of the petitioner under the influence of the Housing Board. Heavy flow of water from first drainage was there on account of that. It was pointed out that the petitioner's property was lying in a low lying area from that of the 3rd respondent and that the drain which was available was connected to the small drain through the compound wall of the 3rd respondent. The Tribunal found that the property of the 3rd respondent was lying 30 cm lower than the ground level and during rainy season there is every possibility of flood in the drain constructed by the Corporation, as a result of which the car porch will get flooded. In the inspection it was found that the house of the 2nd respondent was 30 cm higher than the road level. The Tribunal observed that the letter stated to be issued from the Housing Board stating that the compound wall was constructed putting the drain

exclusively outside the compound wall, not found included in the file. The Tribunal found that the compound wall in quest was not a new one. The Tribunal was also of the view that the disputes between the petitioner and the 3rd respondent were civil dispute and the Corporation need not interfere with the matter. The Corporation also stated that the Housing Board does not have a case that they constructed the compound wall originally in front of plot No.51.

6. As it was found that the notice was issued by the Secretary on the basis of the direction from the Government, the Tribunal relegated the matter to the Secretary of the Panchayat and therefore allowed the appeal setting aside the notice. It was directed to pass fresh orders after hearing all the parties.

7. Ext.P17 order was issued thereafter directing demolition of the compound wall over the private drainage.

8. In the statement filed by the Corporation in this Writ Petition, it is stated that at the time of transfer of the property by the Housing Board the compound wall was constructed in such a way that the drainage was outside the compound wall. According to them the Government had issued orders on 4.2.2013, on the basis of the complaint received, to take urgent

steps to evict the encroachment made by the petitioner. The Corporation stated that the notices were issued to the petitioner on the basis of the direction of the Government as contained in various letters. According to the Corporation drain having 250 metres was constructed by the Housing Board in order to lead drain water to the nearest public drain - Pullikkada Oda, which leads to western direction, then towards north and reaches in front of the petitioner's plot and thereafter reaches the Pullikkada road. The 1st respondent has produced plan of the property to show that the drain which directly entered into the petitioner's property through the culvert was closed by the petitioner obstructing the free flow of drain water and she had also filled up 6 meters out of the total 16 metres length of open drain, causing difficulty to all concerned. According to them if the block made by the petitioner on the drainage of 6 meters by filling up the drain is removed, the flow of rain water will be restored. The act of blocking public drain by the petitioner was found to be sufficient to discharge the entire rain water. According to the 2nd respondent, the right over the drain, which was originally vested in the Housing Board, is vested in the Corporation and the petitioner cannot have any manner of right

to cause obstruction to the drain water.

9. In the counter affidavit filed by the 3rd respondent, it is stated that the recitals in Ext.P1 document are not sufficient to confer any right to the petitioner. She has been approaching various authorities one after another on account of the obstruction caused by the petitioner by closing the drain. It is pointed out that there is another drain constructed by the Housing Board passing through the southern side of the petitioner's property and that the petitioner has encroached upon the same. She has further caused obstruction, after filling up of a portion of the drain with soil, causing obstruction of free flow of water in the property. She has also produced the sketch and plan furnished to the Executive Engineer of the Housing Board. According to them, the drainage system put up by the Housing Board was encroached upon by the petitioner by constructing compound wall and obstructing the drainage system. According to the 3rd respondent, the drain constructed by the Housing Board is vested in the Corporation and this drain is connected to the public drain maintained by the Corporation. She points out that the contention of the petitioner, that under Section 376 of the Municipalities Act, the Municipality has no

power to initiate any action, is not maintainable. The 3rd respondent states that when the Tribunal rejected the contention of the petitioner regarding the drainage and Ext.P17 was passed after hearing all sides, there is no reason for interfering with the impugned orders.

10. After hearing the learned counsel on either side, it is found that the entire issue is in respect of the drain, which the petitioner claims to be in her ownership and possession, which the other respondents dispute. It is an admitted fact that the said drain has been filled up in part. The Corporation has after inspection found that free flow of water is not possible through the same on account of the filling up a portion of the drain, by constructing compound wall over it and it causes nuisance to the people of the locality by water logging.

11. The learned counsel for the petitioner submitted that the action of the Secretary in directing the petitioner to demolish the wall over the drainage or to keep the drainage outside the compound wall, is without any authority. He points out that the letter, which is produced as Ext.R1(b) by the Municipality and issued by the Housing Board to the Municipality makes it clear that water logging if any can be solved in case the Corporation

maintains the drains recently constructed, properly.

12. The learned counsel for the Corporation submitted that the Corporation has got every right over the drainage system and the drains within the area of Municipality, in order to perform their duty towards the residents therein to see that the drainage system is maintained properly without allowing water logging.

13. Under Chapter 16 of the Kerala Municipality Act, 1994, (the 'Act 94' for brevity) the Municipality has got every right over the water supply as well as the sewerage coming within its area. Section 315 provides that all assets including other equipments, all plants, machineries, water works, pumping station, as the case may be, in, along, over or under any public streets in the area of Municipality, all buildings lands and other works, materials, stores and things appurtenant thereto, all the water supply and sewerage service, sewerage works and sewage forms and all buildings, lands, other works, materials stores, and things, execution of works, conduct of water supply distribution, fixing water charge, collection etc. has been transferred to the Municipality. Section 315 is referring to the rights of the Kerala Water Authority under the Kerala Water Supply and Sewerage

Act, 1986. Section 315 also stipulates that the Municipalities have power and right to prepare and implement the water supply scheme or the sewerage scheme within its municipal area. Section 317 provides for the power of the Secretary for the purpose of implementation of any scheme of water irrigation or drainage entrusted to Municipality and for its maintenance.

14. Under Section 413 of the Act 99, any tank, pond, well, hole, stream, dam, bank or other place appears to the Secretary to be, for want of sufficient repair, protection or enclosure, dangerous to the passers-by or to persons living in the neighbourhood, the Secretary may by notice require the owner to fill in, remove, repair, protect or enclose the same so as to prevent any danger there from. Subsection 2 empowers the Secretary to take action in the event of emergency even before notice.

15. Further Section 417 of the Act reads as follows:

“417 (1) Where, in the opinion of the Secretary-

(a) any pool, ditch, tank, well, pond, bog, swamp, quarry, hole, drain, cess pool, watercourse or any collection of water; or

(b) any land on which water may at any time accumulate, is likely to become a breeding place of mosquitoes or in other respect a source of nuisance, the Secretary may, by notice, require the owner or person having control thereof to fill in,

cover over, demolish, weed and stock with larvicidal fish, petrolize, drain-off the same in such manner and with such materials as the Secretary directs and or make such order for removing or abating the nuisance.”.

16. On an overall consideration of the case it can be seen that the Corporation has found that filling up of a part of the drain by the petitioner has caused nuisance to the public on account of water logging. In Ext.P17 it is stated that the drain which is on the side of the road outside the compound wall of the plot of the petitioner as well as the 3rd respondent is not sufficient. It is stated that the level of the petitioner's land is lying low and the drain is provided in order to contain the water coming from up. In case the drain is filled up or a wall is constructed over it, there will not be proper flow of water and that will likely to affect the other neighbouring people and property. The order passed by the Secretary can be one passed in exercise of his power under Rule 417 of the Municipalities Act 1994, in order to curb the nuisance caused. It is seen that the petitioner had a remedy of appeal against Ext.P17 order, which she did not choose to invoke. The order passed by the Secretary cannot be said to be illegal or unwarranted. It is well within his powers to issue such direction, when he was satisfied of the

situation.

In the above circumstances, I do not find any reason to interfere with the impugned order. Hence the Writ Petition fails and is dismissed.

rtr/

Sd/-
(P.V.ASHA, JUDGE)