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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 12.02.2020

+ W.P.(C) 8098/2010 & CM APPL. 32900/2016

LEELA MATHUR

..... Petitioner

Through Ms.Monica Kapoor, Adv. with
petitioner in person.

versus

MCD AND ANR.

..... Respondents

Through Mr.Ajjay Aroraa and Mr.Kapil Dutta,
Advs. for R-1/MCD.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. This writ petition is filed seeking following reliefs:

“(A) Issue a writ, order or direction in the nature of mandamus/certiorari thereby directing the officials of the respondent to dig up the roads and drains and then to reconstruct them in such a way that they are at level with the house of the petitioner;

(B) Issue a writ, order or direction in the nature of mandamus/certiorari thereby directing the respondent corporation to compensate the petitioner for the damages caused to her belongings including furniture etc. due to accumulation of water in her house due to raising of level of roads and drains.”

2. The case of the petitioner is that she is a resident of House No.98, West Azad Nagar, Street No.6, Shahdara South, Delhi. The said property was purchased by her parents in 1952. The original building plan was

sanctioned on 06.03.1969 by the MCD. It is stated that the aforementioned house was at level with the road running in front of it. Thereafter, the road running in front of petitioner's house i.e. Street No.6 was constructed thrice without digging the existing road. Hence, every time the road was prepared/reconstructed, the level of the road rose by about 2 ½ ft. Due to the aforesaid acts of the respondent functionaries, the petitioner's house became lower than the level of the road.

3. The petitioner got married in the year 1965 and went abroad. She came back in 1970 and since then she has been residing at the aforementioned house with her husband. It is stated that due to the acts of the respondent all the dirt from the sewer used to come back to the house, toilets used to remain full which led to a very unhygienic atmosphere. It is further claimed by the petitioner that due to the indifferent attitude of the respondent, the height of the base of the house of the petitioner is 6-8 ft. lower than the said road due to which rain water enters into the house of the petitioner and accumulates in the premises making it very difficult to clear off the same. It has been further pleaded that when it rains heavily and continuously, the accumulating water damages the furniture as well as other goods of the petitioner. It is pleaded that the respondents have violated all laws and exceeded their powers.

4. EDMC has filed written submission. In the written submission, it is pleaded as follows:

- (i) Claim for damages is misplaced. There are disputed questions of facts and hence the same cannot be adjudicated upon by this court.
- (ii) It is pleaded that the petitioner never approached the authority for taking permission/sanction for reconstruction of the old property.

- (iii) It is pleaded that the colony in question is an unauthorized regularized colony. The colony was regularized on 15.11.1987. It is stated that existing roads/lanes of the colony are being maintained since regularization of the colony on the basis of 'as is where is basis'. Further it is stated that the drainage system, sewer and water lines were not found in existence in the unauthorized colonies and the same have developed in a haphazard manner.
- (iv) It is pleaded that in toto 101 properties in the vicinity were inspected by the respondent and out of them only 11 properties were found to be below road level. These 11 properties including the premises in question are very old buildings.
- (v) It is pleaded that sewerage connection has not been obtained by the petitioner and that the same creates the problem of water accumulation.
- (vi) It is further pleaded that the petitioner was asked to construct a toe wall at her entrance point to restrain rain water from entering into her premises but she has failed to do so.

5. I have heard the learned counsel for the parties. They have essentially repeated the above submissions.

6. On 24.04.2012, this court passed the following orders:

“ The petitioner is aggrieved by the accumulation of water in her house which she states is on account of the respondent/MCD having raised the level of the road on which the residence of the petitioner is situated in such a manner that during the rainy season, there is a back flow and over flow of water.

Two Status Reports have been filed by the respondent/MCD. As per the first Status Report dated 23.3.2011, a survey was conducted by MCD of streets Nos. 3, 5 & 6 in West Azad Nagar, Delhi and it was found that only the house of the petitioner is at a low level, being an old constructed property. It was averred that it is difficult to reconstruct the road for redressing the grievance of the petitioner alone. It was further averred that over a period of 60 years, the road has been repaired on a number of occasions due to which, its level has risen above the built up structure in the premises of the petitioner.

In the second Status Report filed by the respondent/MCD on 25.5.2011, it was averred that apart from the premises of the petitioner, there are 11 properties in the area that are below road level and it is technically not feasible for the MCD to bring the level of the road to below the level of the petitioner's premises and the remaining 10 properties.

The technical difficulty expressed by the respondent/MCD can be addressed by the Engineering Department of the MCD after carrying out survey of the petitioner's premises and ensuring that adequate arrangement is made for drainage and outflow of rainy water in such a manner that the petitioner's premises does not get flooded in the monsoons. For examining this aspect, the Superintending Engineer, Engineering Department, MCD is directed to arrange a visit of technical experts in the Department, at the premises of the petitioner on 15.5.2012 at 4PM. The road outside the petitioner's property shall be surveyed and remedial measures undertaken by the respondent/MCD so that water does not accumulate in the premises of the petitioner during monsoons. A Status Report shall be filed by the respondent/MCD within four weeks from the date of conducting the survey/inspection, with a copy to the counsel for the petitioner.

List on 6.7.2012.”

7. Pursuant to the aforesaid order, EDMC filed its status report. In the status report, it is stated that petitioner's premises was surveyed and it was noticed that the level of the house of the petitioner was about 2'-6" below from the road level. It was also noticed that no sewerage connection was obtained by the owner of the premises. The said status report also states that the petitioner has refused to get a sewerage connection on the pretext that she has a septic tank which can take care for both sewerage and waste water. In the said Status Report, it was also noticed that site condition level and sewer line permit the flow of sewerage, waste and rainy water but the petitioner has failed to get the sewerage connection.

The said status report concludes as follows:

“3. After technical inspection of the site and total assessment of the situation it was decided as under:

- i) The owner of the premises has to apply for a sewerage connection to DJB for proper disposal of sewerage as well as overflow of waste /rainy water.
- ii) To avoid over flow of rainy water from road during rain in the premises it was suggested by technical staff to construct a toe wall about 8 inches height in the opening of the gate. It was also suggested that if owner of the premises does not construct the toe wall the department can construct the said toe wall after having due consent from the owner of the premises.”

8. Another status report was filed on 19.07.2013, which reiterates the above facts. It is pleaded that the petitioner is dumping solid waste as well as household garbage in the drains in front of her house resulting in obstruction to normal flow of water. The width of the road in front of the house of the petitioner is about five meters. There are small drains on both sides of the

road for normal flow of the sewerage water, drain water and rainy water which accumulate during the rainy season which also discharges through these drains.

9. Another status report was filed by EDMC on 22.10.2013. In the status report, it is stated that EDMC has inspected 101 properties, and 82 properties out of 101 properties are above road level while 11 properties are below road level. It has been submitted that the said 11 properties are very old and since the road was repaired many times, the level of the road has become slightly raised.

10. The said status reports filed by the respondent reveal the factual position. I may relook at some of the relevant portions of some of the status reports. Reference in this context may be had to the status report filed on 23.03.2011 by Sh.Charan Singh, Executive Engineer, (M-II), MCD, Shahdara South Zone, Delhi. The relevant part of the said status report states as follows:

“2. That the petitioner's father had purchased the property bearing No.98, WEST AZAD NAGAR, STREET NO.6, DELHI in the year 1952 and at the time of purchasing of the property, the level of the property was at par with the road running in front of it. It is further submitted that in 60 years approximately, the road was repaired many times and that was the reason, the level of the road is rising up.”

11. Similarly, in the status report dated 25.05.2011, the respondent stated as follows:

“2. That the deponent had inspected total 101 properties, 55 properties in GALI NO.3, 21 properties in GALI NO.5 and 25 properties in GALI NO.6, including property number mentioned in para no. 4 and 5 of the reply of the status report filed by petitioner. It is submitted that there are 82 properties out of 101

properties which are above the road level and 11 properties were found below the road level. It is further submitted that these 11 properties are very old and since 1987 the roads were repaired many times and that was the reason the level of the road became slightly raised. It is also submitted that the properties mention in the list of petitioner in para 4 -5, there are two properties at same level of the road, two properties are not traceable and four properties are partly above and partly below the road level.”

12. Reference may also be had to the affidavit of Deputy Commissioner Shahdara South Zone, EDMC, Delhi filed in compliance with the order dated 29.07.2016, which states as follows:

“8. That the entire matter was considered by the deponent in view of the pending litigation and the orders passed from time to time. In the light of the report of the Engineering department of the zone, it appears from the report of the engineering department that the concerned officers did not pay proper attention, while raising the level of the lane in question, and the road was not re laid as per settled norms by CPWD manual. Moreover the Building Department did not keep /maintain the records carefully. Hence, Superintending Engineer-I, Shahdara (South) Zone, EDMC being the Head of Engineering Department of the Zone has been directed to conduct enquiry and put up the report within one month so that responsibility could be fixed against the erring officers if any. The copy of the note directing for setting up enquiry is annexed herewith as Annexure R-2.”

13. What follows broadly from the status reports filed by the respondent is that with road repairing/construction done over several decades the height of the road has risen above the height of the base of the house of the petitioner. It is manifest that there is an admission that without digging the old road in question in front of the residence of the petitioner new surface on the road

has been laid number of times and this has caused a rise in the height of the road. This aspect is clearly admitted by the respondents. The inevitable result of this act of the respondent is that during rains, water logging in the house of the petitioner would be inevitable. Clearly respondent have while repairing the road ignored the collateral damage being done to the house of the petitioner.

14. It would follow from the above that clearly the respondents have failed to adhere to the basic building norms. The level of the road has risen substantially due to continuous repair work done by respondent oblivious of the damage to the house of the petitioner, namely the level of the road was elevated to a level higher than the ground level of petitioner's house. It was obvious that in such an eventuality rain water would flow into the residence of the petitioner on account of elevated level of the road. This basic obvious fact was repeatedly ignored and over years EDMC Deptt. kept raising the height of the road. Clearly, the respondents have acted negligently. This act of the respondents has caused huge loss, damage, inconvenience and harassment to the petitioner. Water has been flowing into the house causing damage to the furniture and other moveables besides rendering the house not usable.

15. I may note that right to shelter is a constitutional right which is enshrined in Article 21 of the Indian Constitution. In ***Chameli Singh & Ors. Vs State of U.P. & Ors***, (1996) 2 SCC 549, the Supreme Court commented upon "Right to Shelter" and held that right to live as a human being is not ensured by meeting only the animal needs of man. The Supreme Court held as follows:

“8. In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and Convention or under the Constitution of India cannot be exercised without these basic human rights. Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right. As is enjoined in the Directive Principles, the State should be deemed to be under an obligation to secure it for its citizens, of course subject to its economic budgeting. In a democratic society as a member of the organised civic community one should have permanent shelter so as to physically, mentally and intellectually equip oneself to improve his excellence as a useful citizen as enjoined in the Fundamental Duties and to be a useful citizen and equal participant in democracy. The ultimate object of making a man equipped with a right to dignity of person and equality of status

is to enable him to develop himself into a cultured being. Want of decent residence, therefore, frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself. To bring the Dalits and Tribes into the mainstream of national life, providing these facilities and opportunities to them is the duty of the State as fundamental to their basic human and constitutional rights.”

16. In this case, the petitioner was deprived of a decent liveable accommodation due to the gross negligence and failure of duty of EDMC during the Period of rains. Clearly, her rights to a decent shelter, were violated.

17. Can this court grant compensation to the petitioner for the loss, damages, harassment, violation of her rights etc. in the facts of present matter. The legal position in this regard may be looked at. The Supreme Court in the case of *Nilabati Behera Alias Lalita Behera v. State of Orissa, (1993) 2 SCC 746* was dealing with the issue of award of compensation in proceedings under Article 32/226 of the Constitution. The court noted that the remedy is available in public law based on strict liability for contravention of fundamental rights. The court further held that this right is distinct from and in addition to the remedy in private law for damages for the tort resulting from contravention of the fundamental rights. The court also held that the Supreme Court and the High Courts have wide powers under Article 32 and Article 226 respectively to forge new tools that may be necessary for doing complete justice and enforcing the fundamental rights

guaranteed in the Constitution. The relevant portion of the judgment reads as follows:-

“22. We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

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24. The above discussion indicates the principles on which the Court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right.....”

18. Reference may also be had to the judgment of the Supreme Court in the case of *Municipal Corporation of Delhi, Delhi Vs. Association of Victim of Uphaar tragedy & Ors, (2011) 14 SCC 481*. That was a case in which the Supreme Court dealt with a case relating to a fire tragedy at Uphaar Cinema Theatre due to the negligence of the statutory authority. The Supreme Court held as follows:

“54. It is evident from the decisions of this Court as also the decisions of the English and Canadian Courts that it is not proper to award damages against public authorities merely because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law. In regard to performance of statutory functions and duties, the courts will not award damages unless there is malice or conscious abuse. The cases where damages have been awarded for direct negligence on the part of the statutory authority or cases involving doctrine of strict liability cannot be relied upon in this case to fasten liability against MCD or the licensing authority. The position of the DVB is different, as direct negligence on its part was established and it was a proximate cause for the injuries to and death of victims. It can be said that insofar as the licensee and the DVB are concerned, there was contributory negligence.

55. The position of licensing authority and MCD is different. They were not the owners of the cinema theatre. The cause of the fire was not attributable to them or anything done by them. Their actions/omissions were not the proximate cause of the deaths and injuries. The licensing authority and MCD were merely discharging their statutory functions (that is granting licence in the case of the licensing authority and submitting an inspection report or issuing an NOC by MCD). In such circumstances, merely on the ground that the licensing authority and MCD could have performed their duties better or more efficiently, they cannot be made liable to pay compensation to the victims of the tragedy. There is no close or direct proximity

to the acts of the licensing authority and MCD on the one hand and the fire accident and the death/injuries of the victims. But there was close and direct proximity between the acts of the licensee and the DVB on the one hand and the fire accident resultant deaths/injuries of victims. In view of the well-settled principles in regard to public law liability, in regard to discharge of statutory duties by the public authorities which do not involve mala fides or abuse, the High Court committed a serious error in making the licensing authority and MCD liable to pay compensation to the victims jointly and severally with the licensee and the DVB.

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63. In *Sube Singh v. State of Haryana* [(2006) 3 SCC 178: (2006) 2 SCC (Cri) 54] this Court held: (SCC p. 180c-d)

“It is now well settled that the award of compensation against the State is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 Cr.P.C. Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the law of torts, was evolved in the last two-and-a-half decades.”

19. Reference may also be had to the judgment of the Supreme Court in the case of *Air India Statutory Corporation v. United Labour Union*, (1997) 9 SCC 377. The Supreme Court in the said case held that there is no limitation or fetters on the powers of the High Court under Article 226 of the Constitution except self-imposed limitations. The Supreme Court held as follows:-

“59. The founding fathers placed no limitation or fetters on the power of the High Court under Article 226 of the Constitution except self-imposed limitations. The arm of the Court is long enough to reach injustice wherever it is found. The Court as sentinel on the qui vive is to mete out justice in given facts. On finding that either the workmen were engaged in violation of the provisions of the Act or were continued as contract labour, despite prohibition of the contract labour under Section 10(1), the High Court has, by judicial review as the basic structure, constitutional duty to enforce the law by appropriate directions. The right to judicial review is now a basic structure of the Constitution by catena of decisions of this Court starting from Indira Gandhi v. Raj Narayan to Bommai's case. It would, therefore, be necessary that instead of leaving the workmen in the lurch, the Court would properly mould the relief and grant the same in accordance with law.”

20. Hence, in grave cases of conscious violation of fundamental rights or statutory rights, a Constitutional Court can mould relief accordingly in favour of the petitioner. Relief would include grant of compensation especially where there is gross negligence and violation of the constitutional rights of a citizen.

21. As already noted in this case, the respondent was grossly negligent and oblivious to the rights of the petitioner when re-building the road. It is obvious that the petitioner has suffered damages on account of sewerage and rain water flowing into the residence of the petitioner. This water/sewerage flowed into the residence of the petitioner on account of the conscious and grossly negligent act of the respondents. The petitioner was also subject to temporary deprivation of the use of her only accommodation during rainy days when water entered in her house. Her furniture and belongings were

damaged. She also had to suffer the fate of living in unhygienic conditions due to the water logging. It is also noteworthy that this writ petition is pending since the last ten years. Despite several orders of this court the respondent has not been able to rectify the situation. There was a clear breach of the constitutional rights of the petitioner. The petitioner who is a senior citizen has been subject to much harassment. It would be in the interest of justice to award appropriate damages to the petitioner.

22. The respondent has accused the petitioner of not mitigating the damages. She could have obtained a sewerage connection or could have taken other steps like construction of toe wall to reduce the problem caused by rainy water and sewerage water accumulating inside the premises of her house.

23. The petitioner has filed an estimate of the cost of the construction with the floor plans of AARKITEK COMBINE, Architects, Engineers & Interior Designers for a sum of Rs.12,20,000/- as per market rate of 2014 for carrying out appropriate changes in her house to secure it from flooding. In the facts and circumstances of this case, I award a sum of Rs.3 lakhs to the petitioner to be paid by the respondent/EDMC as compensation for the loss and damages and harassment caused to her by the acts of the respondent/EDMC. This amount shall be paid by the respondent to the petitioner within three months.

24. I also grant the following reliefs to the petitioner:-

(i) I am told that the respondent EDMC has installed a pump at the residence of the petitioner for discharge of water that may flow into the residence of the petitioner. This pump will be handed over to the petitioner who may maintain the same at her own cost.

(ii) The petitioner is advised for apply for a sewerage connection. If such an application is made, DJB shall take steps expeditiously.

25. With the above direction the present petition is disposed of. All pending applications, if any, are also disposed of.

(JAYANT NATH)
JUDGE

FEBRUARY 12, 2020/v
corrected & released on 12.05.2020

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