

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION No.29490 OF 2011

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ORDER:

1. This petition is filed for a writ of *Mandamus* declaring the action of the 1st respondent in issuing the impugned proceedings dated 28.10.2011, served on the petitioners on 31.10.2011, contrary to their own notice dated 25.10.2008 and without giving a copy of the Advocate Commissioner's report, Inspection report and without giving any opportunity to rebut the same, acting contrary to the provisions of GHMC Act, as arbitrary, illegal and consequently to set aside the same.

2. The 1st petitioner is the father and the 2nd petitioner is the son of 1st petitioner. The case of the petitioners is that the subject house bearing No.40/808H, admeasuring 180.8 Sq.Ys. with a constructed area of 885.43 Sft., situated at Srinivasa Nagar, Kurnool Municipal Corporation limits, is belonging to one Abdul Salam who is the father of 1st petitioner and grand father of 2nd petitioner. Sri Abdul Salam gifted the subject property to 1st petitioner, 2nd petitioner and one Naushad Noor who is the brother of the 2nd petitioner, vide gift settlement deed dated 02.11.1998 in Document No.7543/1998. On the same day actual physical possession of the property was also delivered to the petitioners. Pursuant to the same, both the petitioners and Naushad Noor who is the brother of 2nd petitioner are in possession and enjoyment of the said house. The subject house includes a compound wall on the Northern side which is exclusively belonging to the petitioners. While so, when the respondent Nos.3 to 5 tried to occupy the northern compound wall, with an evil intention to raise its height

further in order to convert it into a wall for their proposed construction, petitioners filed OS.No.500/2008 on the file of Prl.Senior Civil Judge, Kurnool against respondents 3 to 5. On 29.09.2008, the Addl.Senior Civil Judge, Kurnool granted ad-interim injunction in IA.No.745/2008 in OS.No.500/2008, restraining the respondents 3 to 5 from interfering in any way with the Northern compound wall belonging to the petitioners herein. But, the respondents 3 to 5 did not receive the injunction order, on one pretext or the other, when it was sought to be served on them and completed the construction of the compound wall in violation of the injunction order, despite having full knowledge of the same. Thereafter, petitioners filed a petition under Order 26, Rule 9 CPC seeking appointment of an Advocate Commissioner to inspect the existing northern compound wall belonging to the petitioners. In pursuance of the same, Advocate Commissioner was appointed to inspect the schedule property and he submitted the report clearly mentioning that a new brick wall was constructed with a height of 4.9 feet. Thereafter, petitioners submitted their plan for the proposed construction of ground floor and first floor residential building by removing the existing ground floor portion. The said plan was returned unapproved on 15.10.2008. Again, when the petitioners submitted a new plan rectifying the defects for the proposed construction the same was approved on 17.10.2008 in B.A.No.20/08/G-3. Thereafter, the 3rd respondent filed WP.No.22662/2008 alleging violation against the petitioners and the same was disposed of by this Court on 06.11.2009, directing official respondents 1 and 2 to ensure that in the building constructed by respondents 3 and 4 (petitioners herein), the set back, particularly on the northern side of that building, is mentioned; and if there is any deviation, compliance therewith

shall be ensured within four weeks from the date of noticing the same, duly issuing notice to respondents 3 & 4.

3. In pursuance to the same, a demolition notice dated 24.04.2010 was issued to the petitioners. Challenging the same petitioners filed WP.No.11491/2010 and this Court on 30.06.2010, disposed of the same making it clear that the impugned notice dt.24.04.2010 shall be treated as a show cause notice and permitting the petitioners to submit their explanation, within two weeks from today; on receipt of such objections, the 1st respondent shall cause inspection of the building in question in the presence of the writ petitioners as well as the respondents 3 to 5 and furnish copies of the inspection reports to both the parties; and thereafter, the 1st respondent shall pass a final order in accordance with law after giving an opportunity of personal hearing to both the parties; and such exercise shall be completed within a period of four weeks from the date of receipt of the explanation of the petitioners.

4. But, now the respondents without making inspection and without serving inspection reports on both the parties, passed the impugned order dated 28.10.2011. Aggrieved by the same, present writ petition is filed.

5. i) The 1st respondent filed counter stating that when the authorities of this respondent Corporation inspected the premises in question, there is a compound wall existing at the height of 10 feet in between the house of the petitioners as well as respondents 3 to 5 herein. He also stated that if the version of the petitioners is true and correct, the petitioners might have taken appropriate action against the respondents 3 to 5 by filing a petition in the

concerned Court for violation of the injunction order passed in OS.No.500/2008.

ii) The 1st respondent further stated in the counter affidavit that as the petitioners did not submit any objection petition as directed by this Court in WP.No.11491 of 2010 to the show cause notice dated 24.04.2010, and as the 3rd respondent filed CC.No.1332/2011 in WP.No.11491/2010 against the 1st respondent for not taking any action, this respondent issued notice to the petitioners on 10.10.2011 to submit their objections. As the petitioners did not respond for the said notice, on 17.10.2011, this respondent issued another notice on 20.10.2011 for personal inspection and requested the parties to be present on the said date in their premises along with documents if any. On 20.10.2011 the authorities of this respondent inspected premises in question and prepared an inspection note. Perusing the inspection note, the 1st respondent issued notice dated 22.10.2011 to both the petitioners and 3rd respondent to attend before this respondent on 24.10.2011 for personal hearing and to pass final orders. On 24.10.2011, the petitioners and the son of 3rd respondent appeared before this respondent and expressed their grievance against each other. Thereafter, as per the direction dated 30.06.2010 issued by this Court in WP.No.11491/2010, this respondent, on verification of the relevant documents available and in view of the Inspection note and on personal hearing of both the parties, passed final orders on 28.10.2011.

iii) The 1st respondent further stated that since notice dated 25.10.2008 under Section 452 of the Act was issued to the petitioners at the time of constructions were under progress, again

issuing of any show cause notice under Section 452 does not arise. It is also stated that notice under Section 452 dated 25.10.2008 was issued on 25.10.2008 while the building in question was under construction and proceedings dated 28.10.2011 were passed after completion of the construction. Hence, there may be some difference in deviations made by the petitioners. It is also stated that as per the directions of this Court in WP.No.11491/2010, proceedings dated 28.10.2011 were issued for removal of deviations and that the authorities of this respondent inspected the subject premises in the presence of both the parties. It is further stated that though the petitioners were offered to take inspection note, they did not show any interest to take the same. Hence this respondent kept the said report on file.

6. The respondents 3 to 5 filed counter narrating the factual aspects in the writ petition.

7. Learned counsel for the petitioners raised only one ground stating that though this Court in WP.No.11491/2010 directed the 1st respondent to make inspection in the presence of parties and to serve inspection report on the parties, no inspection report was served on the petitioners. As such, they prayed to set aside the impugned order only on that ground.

8. Heard learned counsel for the 3rd respondent who states that the deviations committed by the 3rd respondent were regularized vide proceedings dated 474/98/G3, dated 22.12.2000, after paying regularization fee. He also submits that inspection was done in the presence of both the parties and that as the petitioners failed to file explanation within time, the question of serving inspection reports on the petitioners does not arise.

9. This Court vide order dated 30.06.2010 disposed of WP.No.11491/2010 filed by the petitioners. The operative portion of the said order reads as follows;

“the writ petition is disposed of making it clear that the impugned notice dt.24.04.2010 shall be treated as a show cause notice and permitting the petitioners to submit their explanation, within two weeks from today.

On receipt of such objections, the 1st respondent shall cause inspection of the building in question in the presence of the writ petitioners as well as the respondents 3 to 5 and furnish copies of the inspection reports to both the parties. Thereafter, the 1st respondent shall pass a final order in accordance with law after giving an opportunity of personal hearing to both the parties. Such exercise shall be completed within a period of four weeks from the date of receipt of the explanation of the petitioners.”

10. Though, it is stated that the petitioners have not filed explanation, in the second page of the impugned order, it is shown that the petitioners have submitted explanation on 19.10.2011. In the impugned order, nowhere it is mentioned that the inspection reports were served on the petitioners as per the direction of this Court in WP.No.11491/2010. In the counter of the 1st respondent also, it is only stated that though report was offered to the petitioners, the petitioners have not shown any interest to take the same. But, the date of proceedings through which the petitioners were offered the reports were not mentioned. Even the counsel for the 3rd respondent does not produce any material to show that the inspection report was served on the petitioners. More so, the counter of the respondents 3 to 5 does not indicate that the inspection report was served on the petitioners.

11. In view of the above without going into other aspects whether the deviations mentioned in the impugned order were correct or not, only on the ground of non compliance of the order passed by this Court in WP.No.11491/2010 with regard to furnishing of inspection report copies to the petitioners, the impugned order is liable to be set aside.

12. Accordingly, the impugned order dated 28.10.2011, issued by the 1st respondent is set aside and the 1st respondent is directed to furnish the copies of inspection report to both the parties within a period of two weeks from the date of receipt of a copy of this order. Thereafter, it is open for the petitioners and respondents 3 to 5 to file objections on the inspection report within two weeks; and on filing of such objections the 1st respondent is directed to pass orders within a period of three weeks and take action accordingly.

13. With the above direction, the writ petition is disposed of. No order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the writ petition, shall stand closed.

A.RAJASHEKER REDDY, J

08.06.2015
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