

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

W.P.No.37983 of 2014

%20-01-2014

G.Usha Rani

...petitioner

VERSUS

\$ State of Andhra Pradesh, rep. by its Principal Secretary and three others.

...RESPONDENTS

< **GIST:**

> **HEAD NOTE:**

!Counsel for the petitioner

: Sri V.S.K.Rama Rao

**^ Counsel for 1st respondent
Municipal Admn. State**

: G.P. for

of AP

^ Standing Counsel for GVMC-respondent

**Nos.2 to 4
Reddy,**

: Sri S.Lakshmi Narayana

? Cases referred

^[1] (1995) 1 S.C.C. 47

² (2007) 8 S.C.C. 705

³ 2007(8) S.C.C 748

⁴ (2008) 8 SCC 42

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

WRIT PETITION No.37983 of 2014

ORDER:

Heard the learned counsel for the petitioner Sri

V.S.K.Rama Rao, learned Government Pleader for Municipal Administration, State of A.P. for 1st respondent and Sri S.Lakshmi Narayana Reddy, learned Standing Counsel for the Greater Visakhapatnam Municipal Corporation (GHMC) appearing for respondent Nos.2 to 4.

2. The petitioner purchased plot No.14 admeasuring 300 sq yds at Simhagiri Nagar Layout (Sy.No.164/5C, Appannapalem, Vepagunta village, Visakhapatnam) approved vide PR.No.16 dt.22-08-1971 by Vepagunta Village Panchayat from three individuals by name Sri Karakavalasa Bhaskara Raju, s/o Rayanna, Sri Davupati Michael, s/o. Rayanna and Smt. Davupati Rani, w/o Michael through a registered sale deed dt.19-11-2010 at the office of Joint Sub-Registrar, Gopalapatnam. The petitioner applied for building permission for construction of residential building consisting of stilt+ground+two upper floors vide BA.No.13756 dt.23-07-2014 to 2nd respondent.

3. Alleging that the said application was pending consideration before 2nd respondent, and that she was not informed about it's fate by respondent Nos.2 to 4, petitioner filed present Writ Petition contending that she was orally informed that respondents

are proceeding with laying a road Bus Rapid Transit System (BRTS Road) from KM 16 + 000 to KM 17+000 and from KM 17+000 to KM 18+225 (Simhachalam Transit Corridor) and her application for building permission would not be favourably considered. She further alleged that she gave a notice on 24-11-2014 to 2nd respondent informing the 2nd respondent that she has paid requisite fee for building permission, that she has not received any communication from respondent Nos.2 to 4 regarding the fate of her application, and since the statutory period for consideration of her application is over, the building permission in her favour is deemed to have been approved and she would proceed with construction. She alleged that when she commenced construction on 28-11-2014, officials of respondent No.2 visited her property and forced her to stop construction. She contended that this is illegal since under Section 428 of the Greater Hyderabad Municipal Corporation Act, 1955 (for short 'the GHMC Act'), once her application for permission to make construction was not disposed of in thirty days, it is deemed to be approved and the respondent Nos.2 to 4 cannot stop construction by her. It is also contended that if the respondents require her property for laying a road, they should follow the procedure contemplated by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'the

2013 Act) and they are not entitled to deprive her of her property for the above road project without doing so.

4. On 10-12-2014, the Writ Petition came up for admission and the learned Standing Counsel for respondent Nos.2 to 4 sought time to get instructions as to the fate of the petitioner's application dt.23-07-2014 for building permission. On 11-12-2014, the learned Standing Counsel produced an endorsement BA No.13756/2014/ACP-VI dt.04-08-2014 stating as under:

“with reference to the building application 1st cited, it is to inform that as per the remarks of the town survey or in the reference 2nd cited, the proposed site falls in 200'-00” Master Plan Road Widening.

Hence, the plans are herewith returned unapproved.”

5. The said endorsement indicated that it was received by one J.Raju and it was dispatched on 04-08-2014.

6. The petitioner then filed W.P.M.P.No.48756 of 2014 seeking amendment of the prayer in the Writ Petition questioning this endorsement. She alleged that the said endorsement is illegal, arbitrary and violative of Principles of natural justice and provisions of GHMC Act and sought a direction to the

respondents to approve the building permission B.A.No.13756 dt.23-07-2014 of the petitioner. This application was allowed by this Court on 18-12-2014. In the affidavit filed in support of the said application, petitioner contended that she was not served the said endorsement and she had nothing to do with Mr.J.Raju and did not authorize him to receive any notice. She contended that even to her notice dt.24-11-2014, the respondents had not replied and they brought it into existence after the institution of the Writ Petition by her. She further contended that the said road widening referred to in the endorsement is contrary to law; that there is an existing 60' road; if a 200' road is to be laid, the respondents should take 70' on either side of the existing road but they have taken 95' on the southern side of the existing road; and so the endorsement that the petitioner's site falls in the 200' Master Plan Road widening is false.

7. A counter affidavit was filed on 24-12-2014 by respondents 2-4 stating that this endorsement was served on one J.Raju, that the petitioner's building application was returned on 04-08-2014 itself within thirty days from the date of submission of the said application, that she cannot claim benefit of the deeming provision contained in Section 437 of the GHMC Act and consequently the construction being made by her is

illegal. It is alleged that the petitioner has raised pillars after 04-08-2014 in her site, that notice under Section 452 of the GHMC Act was issued to her and since she refused it, it was affixed on the wall of the structure erected by petitioner. The 2nd respondent contends that the petitioner was aware that her building application was not approved and it was returned on 04-08-2014 and suppressing the same, the Writ Petition was filed. It is contended that since the petitioner's property falls in the 200' Master Plan Road widening portion as per Master Plan prepared by the Visakhapatnam Urban Development Authority, no building permission can be granted to her. Reliance was also placed on Rule 16 (a) of the AP Building Rules, 2012 (herein after referred to as 'Rules') and it is contended that under the said Rule, area affected by road widening should be surrendered *free of cost* to 2nd respondent; that petitioner's site would fall under 40' road widening and only 5' site would be left; so petitioner cannot even surrender the affected portion to 2nd respondent; and her application for building permission cannot be approved.

8. The learned counsel for the petitioner contended that there is no provision in the GHMC Act which permits 2nd respondent Corporation to demand transfer of any property required by it free of cost; that Section 146/147 of the Act direct the 2nd respondent

Corporation to either acquire property by negotiation or under the provisions of the Land Acquisition Act, 1894; and so Rule 16 (a) referred to above is *ultra vires* the provisions of the GHMC Act. He contended that such a view has already been taken by this Court in its judgment dt.08-12-2014 in W.P.No.34412 of 2014; that merely because petitioner's private property was shown in the Master Plan of Visakhapatnam as affected by road, it would not extinguish the title of the petitioner; and if the respondents wish to deprive the petitioner of the said land, it is incumbent on the part of the 2nd respondent to request the 1st respondent to acquire the same under Section 18 of the AP Urban Areas (Development) Act, 1975 by invoking the 2013 Act. He also placed reliance on the judgment dt.02-09-2014 in W.P.No.1995 of 2012 and judgment dt.16-10-2014 in W.P.No.24427 of 2014 of this Court as well as the decisions of the Hon'ble Supreme Court of India in **Pt. Chet Ram Vashist v. Municipal Corpn. of Delhi**^[1], **Chairman, Indore Vikas Pradhikaran Vs. Pure Industrial Coke & Chemicals Ltd. and others**^[2] and **M.Naga Venkata Lakshmi v. Visakhapatnam Municipal Corporation and another**^[3]. He also reiterated the contentions raised in the affidavit filed in support of the Writ Petition and the amendment

application.

9. The learned counsel for 2nd respondent contended that petitioner's property falls in the 200' Master Plan Road widening portion as per the Master Plan prepared by the Visakhapatnam Urban Development Authority and as such no building permission can be granted in such land as per Section 15 of the AP Urban Areas (Development) Act, 1975; an extent of 40' out of his property would be affected by road widening leaving only 5' balance land; so petitioner cannot even surrender the affected portion to 2nd respondent as contemplated in Rule 16 (a) of the Rules; and the building permission of the petitioner was rightly rejected by the impugned endorsement.

10. I have noted the submissions of both sides.

11. Rules 16 and 17 of the Rules notified **vide G.O.No.168, Municipal Administration and Urban Development, dated 07.04.2012.**

"Rule 16 of the Rules reads as under:

"16. Concessions in Road Widening Cases:

(a) Where any land or site or premises for building is affected in Statutory Plan/Master Plan Road or Circulation network or a road required to be widened as per Road Development Plan, such area so affected in the road or circulation network shall be surrendered free of cost to the Sanctioning Authority by the owner of land. No development permission shall be given unless this condition is complied with.

(b) Upon surrendering such affected area

the owner of the site would be entitled to a Transferable Development Right (TDR) as given in Rule-17.

OR

The owner shall be all owed to construct an extra floor with an equivalent built area for the area surrendered subject to mandated public safety requirements.

OR

The owner shall be allowed to avail concessions in setbacks including the front set-back (subject to ensuring a building line of 6m in respect of roads 30m and above, 3m in respect of roads 18m and below 30m and 2m in respect of roads less than 18m and subject to ensuring mini mum side and rear setback of 2m i n case of building of height up to 12m and 2.5m in case of buildings of height above 12m and up to 15m and 3m for buildings of height above 15 and up to 18m).

(c) The extent of concessions given shall be such that the total built up area after concession shall not exceed the sum of built up area al l owed (as proposed) on total area without road widening and built up area equivalent to surrendered area.

(d) In case of plots less than 750 sq.m in addition to concessions in setbacks and height, the cellar floor may be allowed keeping in view of its feasibility on ground.

(e) In case of High Rise Buildings the concessions in setbacks, other than the front setback would be considered subject to maintaining mini mum clear setback of 7m on the sides and rear side and such mini mum setback area shall be clear without any obstructions to facilitate movement or fire fighting vehicles and effective fire fighting operation.

(f) The above concessions shall be considered at the level of Sanctioning Authority/Competent Authority.

The Sanctioning Authority / Competent Authority may consider any other concession as deemed fit with the prior approve of Government.”

12. Rule 17 of the Rules contemplates grant of transferable development right.

13. But Section 146 of the GHMC Act contemplates acquisition of immovable property by agreement between the Commissioner and the owner of the land in the event the said land is required by the Corporation; and when he is unable to do so, Section 147 of the GHMC Act provides for acquisition of the land under the provisions of the Land Acquisition Act, 1894 as amended from time to time. The provision in Rule 16(a) of the Rules, which states that unless the area affected in road widening as per the statutory plan/master plan road or Circulation network is surrendered *free of cost*, no development permission shall be given, in my opinion, is *ultra vires* provisions of the GHMC Act. Rule 16(a) of the Rules is not in accordance with the GHMC Act, and is contrary to Section 146/Section 147 thereof. It is settled law that in case of conflict between delegated legislation and its parent substantive Act, the latter would prevail (See **Novva Ads vs. Deptt. of Municipal Admn. And Water Supply**^[4]). Therefore, the provision requiring land owner to surrender land *free of cost* merely because a portion of the land owned by him is shown as road affected in a statutory plan/master plan or circulation network or as required to be widened as per road

development plan is *ultra vires* provision of the GHMC Act. Such compulsory deprivation of property without paying any compensation violates Articles 14 and 300-A of the Constitution of India. The respondents' conduct amounts to coercing the petitioner to part with her property without acquisition. In my opinion, it would be unjust to make the petitioner to suffer in this manner.

14. The A.P. Urban Areas (Development) Act, 1975 was enacted by the then Andhra Pradesh State Legislature for development of urban areas in the State of Andhra Pradesh according to plan and for matters ancillary thereto. The said Legislation is regulatory in nature and it restricts the right of an owner of property to use and develop his land in larger public interest. It therefore requires strict construction and such restrictions must be reasonable restrictions. In any event, it is not an expropriatory statute.

15. Section 15 thereof prohibits land use contrary to that earmarked in the statutory master plan/zonal development plan.

16. The two competing interests i.e. the interest of the State vis-à-vis the general public to have better living conditions and the right of property of an individual, though not a fundamental right but which is still a constitutional and human right, need to be balanced. Therefore, enforcement of the said Act should be done

in such a way that a citizen is not deprived of his property save in accordance with law. If a zoning classification imposes unreasonable restrictions, it cannot be sustained.

17. In **Pt. Chet Ram Vashist** (1 supra), the Supreme Court had to consider whether the Municipal Corporation of Delhi, in the absence of any provision in the Delhi Municipal Corporation Act, 1957, was entitled to sanction a plan for building activities by imposing a condition that the open space for parks and schools be transferred to it free of cost. Section 313 of the said Act entitled the Standing Committee of the said Corporation to accord sanction to a layout plan on such conditions as it may think fit. The Supreme Court held that the expression “such conditions” has to be understood so as to advance the objective of the provision and the purpose for which it has been enacted. It held that the Corporation has been given the right to examine that the layout plan is not contrary to any provision of the Act or the Rules framed by it and therefore it may direct a person seeking a layout plan to leave certain open space, or to adhere to the length and width of the rooms of particular dimensions, or it may direct him to provide certain amenities and facilities to those who purchase land or buildings in its colony. It held that such power cannot be construed to mean that in exercise of placing

restriction or imposing conditions before sanctioning a layout plan, it can also claim that it shall be sanctioned only if the owner surrenders a portion of the land and transfers it in favour of the Corporation free of cost. It held that this would be contrary to the language used in the Section and violative of civil rights which vest in every owner to hold his land and transfer it in accordance with law. It therefore held that the resolution passed by the Corporation, directing the appellant to transfer the space reserved for tube-wells, school and park in its favour free of cost by depriving the owner of its property and vesting it in the Corporation, is against the law. It rejected the finding of the High Court that such a condition did not amount to transfer of ownership but it was only a transfer of the right of management. It observed:

“6. Reserving any site for any street, open space, park, school etc. in a layout plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned layout plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any

provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred to the person in whose favour it is transferred. The resolution of the Committee to transfer land in the colony for park and school was an order for transfer without there being any sanction for the same in law.”

18. This decision was followed in **Indore Vikas Pradhikaran** (2 supra) and the latter judgment was followed in **M.Naga Venkata Lakshmi**(3 supra).

19. In **M.Naga Venkata Lakshmi** (3 supra), the appellant before the Supreme Court had purchased a plot in a layout in Visakhapatnam under a sale deed dt. 08-07-1982. At that time the said layout was not an approved layout. The competent authority to approve a layout plan was the Visakhapatnam Urban Development Authority (for short ‘VUDA’) constituted under the Andhra Pradesh Urban Areas (Development) Act, 1975. A revised plan was prepared in 1989 changing the name of the locality and regularizing the plots of others in the area but the appellant’s plot was not so regularized. The appellant’s representation to VUDA was not responded to and the appellant’s application for sanction of a building plan was rejected by the Visakhapatnam Municipal Corporation on the ground that the proposed

constructions fell in a reserved open space of the layout as per the revised plan of 1989. Her writ petition was dismissed by the High Court and was confirmed in Writ Appeal. She then approached the Supreme Court. The Supreme Court held that this action of the VUDA and the Visakhapatnam Municipal Corporation amounts to depriving the appellant of a valuable right of property without payment of compensation. It observed that the appellant should have been informed that her land had been earmarked for providing an open space to the other owners of the layout. It therefore found fault with the orders passed by the High Court, set aside the said orders and remitted the matter back to the Single Judge of the High Court for fresh consideration.

20. Section 17 and 18 of the A.P.Urban Areas (Development) Act,1975 state:

“Section 17 - Plans to stand modified in certain cases:

(1) Where any land situated in any development area is required by the Master Plan or Zonal Development Plan to be kept as an open space or unbuilt upon or is designated in any such plan as subject to compulsory acquisition, if at the expiration of ten years from the date of operation of the plan under Section 10 or where such land has been so required or designated by any amendment of such plan, from the date of operation of such amendment, the land is not compulsorily acquired, the owner of the land may serve on the Government a notice requiring his interest in the land to be so acquired.

(2) If the Government fail to acquire the land within a period of six months from the date of receipt of the notice, the Master Plan or Zonal Development Plan, as the case may be, shall have effect after the expiration of the said six months, as if the land were not required to be kept as an open space or unbuilt upon or were not designated as subject to compulsory acquisition.

Section 18 - Compulsory acquisition of land:

(1) If, in the opinion of the Government, any land is required for the purpose of development or for any other purpose under this Act, the Government may acquire such land under the provisions of the Land Acquisition Act, 1894.

(2) Where any land has been acquired by the Government they may, after they have taken possession of the land, transfer the land to the Authority or any local authority for the purpose for which the land has been acquired on payment by the Authority or the local authority of the compensation awarded under that Act and of the charges incurred by the Government in connection with the acquisition.”

21. Nowhere in the counter affidavit filed by 2nd respondent, is the date of coming into operation of the Master Plan prepared by the Visakhapatnam Urban Development Authority given. But the website of the said authority indicates that originally the Master Plan was prepared under the AP Urban Areas (Development) Act, 1975 in the year 1989 and the same was revised vide G.O.Ms.No.345 MA dt.30-06-2006.

22. Admittedly the petitioner has purchased the property on 19-11-2010 from his vendor under registered

sale deed and his vendors had purchased the same under registered sale deeds dt.16-02-1989.

23. According to 2nd respondent, endorsement dt.04-08-2014 was served on the petitioner's agent one J.Raju, but the petitioner has denied that the said person has anything to do with her. It is not the case of 2nd respondent that the petitioner was personally served a copy of this endorsement. Since on 11-12-2014 after the Writ Petition is filed, copy of the said endorsement was handed over to the counsel for the petitioner, it has to be taken that the petitioner became aware of the fact that her land is affected by the Master Plan only on that day.

24. In my opinion, Section 17 of the above Act is not attracted since the Master Plan has not designated the petitioner's property as an open space or to be un-built or designated it as subject to compulsory acquisition. But I am of the opinion that Section 18 is mandatory and if the respondents require the petitioner's property for the 200' Master Plan Road, they are bound to acquire it under the provisions of the 2013 Act.

25. In view of this provision, and law declared by the Supreme Court in the above referred decisions, it is incumbent on the part of the respondents to initiate proceedings under Section 18 of the AP Urban Areas

(Development) Act, 1975 in accordance with the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 for acquisition of the land of the petitioner for road widening and pay compensation to the petitioner. If not, the petitioner would be deprived of her valuable property without compensation.

26. Since according to 2nd respondent, 40' out of the petitioner's land is required for road widening leaving only balance of 5', and petitioner cannot put to use such small area for construction, it is obligatory on the part of 2nd respondent to acquire the entire property of the petitioner. Otherwise, it would amount to legitimizing the arbitrary and expropriatory action contrary to the provisions of the GHMC Act as well as the AP Urban Areas (Development) Act, 1975 and the law declared by the Supreme Court in the above decisions. Similar view has been taken by this Court in its judgment dt.02.09.2014 in W.P.No.1995 of 2012 and in judgment dt.16-10-2014 in W.P.No.24427 of 2014.

27. Therefore, the respondents are directed to initiate proceedings under Section 18 of the AP Urban Areas (Development) Act, 1975 in accordance with the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, for acquisition of the entire land

owned by the petitioner for road widening and pay compensation to the petitioner. The requisition for the said purpose should be sent by the second respondent to the first respondent within a period of two weeks from the date of receipt of a copy of this order; the first respondent shall initiate the process for acquisition for road widening within a period of one month thereafter; and conclude the same within a period of three months.

28. The Writ Petition is allowed accordingly.
There shall be no order as to costs.

29. The miscellaneous petitions, pending if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 20-01-2015

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[\[1\]](#) (1995) 1 S.C.C. 47

[\[2\]](#) (2007) 8 S.C.C. 705

[\[3\]](#) 2007(8) S.C.C 748

[\[4\]](#) (2008) 8 SCC 42