

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Writ Petition No.20359 of 2010

ORDER:

The present writ petition has been filed by the writ petitioner under Article 226 of the Constitution of India being aggrieved of the action of the respondents in calling upon the petitioner to submit an undertaking in a prescribed proforma, even in the absence of any Rule of law requiring the petitioner to give such an undertaking.

2. I have heard the submissions of the learned counsel for the petitioner and the learned Standing Counsel for Greater Visakhapatnam Municipal Corporation (GVMC) appearing for the respondents. I have perused the material record.

3. The facts, which fall for consideration, in brief, are as follows:

As the building of the petitioner has become weak and required demolition, she had applied to the 1st respondent/Commissioner, GVMC for permission and approval for construction of a new building. The permission and approval were granted *vide* proceedings dated 24.10.2005 in BA.No.11214/ACP-II-G4. The petitioner had made constructions, however, in deviation of the sanctioned plan. The Government had formulated a Building Penalisation Scheme ('the BPS', for brevity). To avail the benefit of the said scheme, the petitioner had applied to the 1st respondent *vide* her application dated 03.05.2008 for regularisation of the constructions, which were made in deviation of the sanctioned plan. She had also paid Rs.7,34,100/- towards penalisation charges. The 2nd respondent-the City Planner of the Town Planning Section of the 1st respondent had returned the application through letter dated 06.06.2008 for the reason that the petitioner has to pay a further amount towards penalisation charges. The petitioner had paid the said amount on 13.06.2008. When the petitioner had applied for electricity service connection to the said building, the officials of the said department called

upon her to clarify through the 1st respondent regarding her application for regularisation pending with the 1st respondent in regard to deviations made from the sanctioned plan while constructing the said building. Simultaneously, the petitioner and the electricity department addressed letters to the respondents seeking clarifications. Thereupon, the 2nd respondent had issued a letter dated 27.06.2008 to the electricity department confirming the payment of penalisation charges as stated above by the petitioner. From the contents of the said letter it came to the notice of the petitioner that the respondents called upon the petitioner to submit an undertaking on a Rs.100/- non judicial stamp paper as a condition precedent for regularisation of the deviations under the BPS.

4. Now the short question is as to whether the respondents are permitted under law to call upon the petitioner to give an undertaking.

5. Before proceeding further, it is necessary to note that the undertaking, which the petitioner was called upon to give in the proforma prescribed, reads as under:

‘With reference to your office endorsement, I am herewith submitting the required undertaking for road widening purpose for the extent effect in my site at free of cost to Greater Visakhapatnam Municipal Corporation.

1. I will not claim any compensation for the site affected in road widening as above.
2. I will not construct any construction in the site being left for road widening purpose.
3. I agree to relinquish my ownership rights over the site being left for road widening purpose.

[Reproduced verbatim]

6. At the hearing, the learned counsel for the petitioner would fairly submit that at the time of filing of the writ petition, the petitioner having regard to the contents of the GOMs.No.901, Municipal Administration and Urban Development (M1) dated 31.12.2007 in regard to the A.P Regulation And Penalisation of Unauthorizedly Constructed Buildings And Buildings Constructed in Deviation of the Sanctioned Plan Rules, 2007 (‘the Rules’, for short) was of the view that there is no Rule requiring the petitioner to give an

undertaking and that, therefore, the averments in the writ petition were made accordingly and that however, after filing of the writ petition, the writ petitioner came to know that *vide* GOMS.No.112 dated 31.01.2008 certain amendments were carried out to the above said Rules and that in view of the amendments and by virtue of Rule 5(7) of the Amended Rules , the Corporation is entitled to seek an undertaking from a person to whose case the provision in the Rule is applicable. He would further submit that even the said sub-rule (7) of Rule 5 also is not applicable to the case of the petitioner as according to the case of the petitioner the constructions were not made within the building line of a major road of a width of 80 feet and above within the limits of GVMC and that, therefore, the Corporation is not entitled to call the petitioner to give an undertaking.

7. *Per contra*, the learned Standing Counsel appearing for the respondents would submit that admittedly constructions were made in deviation of the sanctioned plan and that the petitioner having applied for regularisation under the BPS is obliged under facts and in law to comply with the requirements of the Rules and that the Corporation is also obligated to follow the Rules before regularising the subject constructions, which were made in deviation of the sanctioned plan, and that in view of the clear mandate of Rule 5(7) the respondents are justified in calling upon the petitioner to give an undertaking as required under the provision of law and that the contention regarding the width of the road now raised at the time of hearing by the learned counsel for the petitioner does not find support from the pleadings and that in the pleadings in the writ petition it is not pleaded as to what is the width of the road and that in the absence of such a pleading, the petitioner is not entitled to raise any contentions beyond the pleadings in a proceeding under Article 226 of the Constitution of India and that, therefore, the writ petition is liable for dismissal.

8. In reply, the learned counsel for the writ petitioner would submit that as per the instructions received by him from the petitioner, the road is not a major road of a width of 80 feet and above and that even though a pleading in that regard is absent in the writ petition, the writ petitioner is entitled to make a

submission in regard to the width of the road as the Corporation being an instrumentality of the State is required to follow strictly the provision of law and that the Corporation is obliged to call for an undertaking, if only the constructions were made within the building line of major roads of a width of 80 feet and above and not otherwise and, therefore, it is not open to the Corporation to contend that simply because there is no pleading in the writ petition, the petitioner is required to give an undertaking even though the constructions that were made are not within the building line of a major road of a width of 80 feet and above.

9. In the light of the aforesaid submissions, it is necessary to refer to the Rule 5(7) of the Rules, which reads as under:

“In case of constructions made within the building line of major roads of width 80 feet and above within the limits of Greater Hyderabad Municipal Corporation, Greater Vishakhapatnam Municipal Corporation, and Vijayawada Municipal Corporation and roads of width 60 feet and above in rest of the urban areas as per Master Plan/Zonal Development Plan, the regulation and penalization shall be done subject to the property owner furnishing a legally enforceable undertaking that he will surrender the land falling within the building line to local body/UDA free of cost as and when required in future for road widening or other public purposes.”

9.1 The learned Standing Counsel for GVMC had placed reliance upon a decision in **K.H.V.Prasad and others v. Government of Andhra Pradesh, rep. by its Principal Secretary, Municipal Administration and Urban Development and Others**^[1], wherein it was held as under:

“Further, under clause (m) it was originally provided that on all major roads of width of 80 feet and above within the Greater Hyderabad Municipal Corporation, Greater Visakhapatnam Municipal Corporation, Vijayawada Municipal Corporation and roads of width 60 feet and above in other municipal and urban areas, no constructions affecting the building line would be permissible for regularization. Under G.O.Ms.No.112 the aforesaid clause (m) is also deleted.....”

Based on such deletion, it was contended before the Division Bench of this Court that once the building line on such major roads is ignored and regularization is allowed, it will be impossible in the future to take up any development on all such roads. On the basis of such contentions, this Court

had noted that in the place of the deleted clause (m), Rule 5(7), which was extracted above was inserted and had further held as under:

‘Under the said Sub-rule (7) of Rule 5 though the buildings constructed within the building line on such major roads can be considered for regularization or penalization but is subject to an undertaking given by the owner/builder that in the event of any part, thereafter, is being affected in future road widening or other public purpose, he would surrender the affected portion without claiming any compensation. In other words, therefore, while buildings made within the building line of such major roads, even if regularized and penalized, that would not make such construction immune from requirement for public purpose including road widening in the future. On the contrary, in such eventuality, the Government would be entitled to the affected portion without the necessity of paying any compensation to the owner/builder, in view of the undertaking, from such person, secured by the Government at the time of regularization itself. To our mind, therefore, the aforesaid provision sufficiently safeguards the public interest and it is not, as if, that once construction is regularized within the building line on major roads, no development of the said road could take place at any future time. The said construction even if regularized and penalized would not make it immune from requirement of any part thereof for any public purpose including road widening in future. Deletion of Clause (m) under G.O.Ms.No.112 dated 31.01.2008 is, therefore, sufficiently safeguarded by insertion of Rule 5(6) and thereby the contention to the contrary raised by the learned counsel for the petitioners is not sustainable.’

10. A plain reading of the said Rule 5(7) would show that the regularisation and penalisation shall be done subject to the property owner furnishing a legally enforceable undertaking to the effect that he/she will surrender the land falling within the building line to local body or UDA free of cost as and when required in future for road widening or for other public purposes, if only the constructions are made within the building line of major roads of a width of 80 feet and above within the limits of GVMC. In view of the ratio in the decision and the provision of the Rule extracted supra, as rightly contended, the Corporation being an instrumentality of a State is obligated to call for an undertaking in all cases to which the provision of law is applicable. Therefore, the Corporation is required under the Rule to satisfy itself about the applicability of the Rule before calling the applicant under the BPS to submit an undertaking in the proforma prescribed. Therefore, this Court is of the considered view that the respondents while doing penalization and regularization are under an obligation to first satisfy themselves about the width of the road and the applicability of the relevant Rule to the constructions

that were made by the petitioner in deviation of the sanctioned plan. Having regard to the facts, the submissions and the reasons, this Court is satisfied that the writ petition can be disposed of with apposite directions.

11. Accordingly, the writ petition is disposed of with the following directions.

The respondents shall give an opportunity of hearing to the writ petitioner to establish the width of the subject road within the building line of which the constructions were made and record a specific finding as to the width of the road and then implement the provision of Rule 5(7) of the Rules, if only, it is found that the subject constructions were made within the building line of a major road of a width of 80 feet and above within the limits of GVMC and not otherwise.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this writ petition shall stand closed.

M. SEETHARAMA MURTI, J

12th February 2016
Vjl

[\[1\]](#) 2009 (4) ALD 803