

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Writ Petition No.954 of 2011

ORDER:

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This writ petition under Article 226 of the Constitution of India is filed seeking the following relief:

“For the reasons stated in the accompanying affidavit, it is hereby prayed that this Hon’ble Court may be pleased to issue a Writ, order or direction more particularly one in the nature of Writ of Mandamus, declaring the action of the respondent in proceeding to demolish the building bearing D.No.27/I/115, Ramjee Nagar (Balaji Nagar) Nellore Town, SPSR Nellore District without considering the explanation submitted by the petitioner and without passing a speaking order as illegal, arbitrary and in violation of principles of natural justice and consequently direct the respondent not to demolish the building bearing H.No.27/I/1115 of Ramjee Nagar (Balaji Nagar), Nellore Town, SPSR Nellore District, and pass such other or further order or orders as deem fit and proper in the circumstances of the case.”

[Reproduced verbatim]

2. I have heard the submissions of the learned counsel for the writ petitioner and the learned Standing Counsel for the respondent-Corporation. I have perused the material record.

3. The facts that emerge from the pleadings and the submissions made on behalf of the petitioner may be summed up as under:

The land admeasuring an extent of Ac.2.79 cents in S.No.845 part of Nellore Bit II was laid into house plots and the layout was approved in L.P.No.389/87. The wife of the petitioner, Y.Rama Devi, had purchased the plot no.23 in S.No.845/Part of Adhithya Nagar Area from one Sundanamma under a registered sale deed bearing Document no.336 of 1989 dated 27.01.1989. She had executed the registered settlement deed dated 01.06.2002 in favour of her daughter, Devaram Mahitha. By virtue of the said registered settlement deed, the writ petitioner’s daughter-Mahitha became the absolute owner of plot no.23. She had obtained approval vide proceedings

in B.A.No.885/2003 dated 18.09.200 of the respondent-Municipality for the construction of a building and had constructed a building consisting of ground, First and Second floors as per the approved building plan. The property was assigned Door No. 27-1-1115. Admittedly, on the Southern side of the building, there is an irrigation channel; and to the further South of the said channel, there is a 60 feet wide road. While so, when the respondent-Corporation had made some markings on the subject building of the petitioner's daughter and was taking steps to demolish the building to the extent of the marked portion for the purpose of road-widening, the writ petitioner, on behalf of his daughter, had earlier filed W.P.No.21009 of 2010 before this Court seeking appropriate directions. At the time of hearing of the said writ petition, the learned Standing Counsel, on instructions, had stated on behalf of the Corporation, that for the purpose of road widening, the Corporation had taken up survey work and that so far, no action was initiated for demolition of the said building and that if the subject building or any part thereof is required to be demolished in the process of road widening, the Corporation will issue notice to its owner and will follow the due process of law. Recording the said submission of the then learned Standing Counsel of the Corporation and keeping in view the facts and the circumstances of the case, this Court having deemed it appropriate to dispose of the writ petition had accordingly disposed of the said writ petition with the following directions:

“If the subject building or any part thereof is required to be demolished for any public purpose, the respondent shall issue notice to its owner and follow due process under law.”

Subsequently, i.e., on 23.10.2010, the respondent-Corporation had issued a notice to the writ petitioner under Sections 405 and 406 of the Hyderabad Municipal Corporation Act, *inter alia* stating that the writ petitioner had occupied the poramboke land in an extent of 11X32=352 in sy.no.870, i.e., Chintareddypalem Kaluva Poramboke site and had constructed RCC A/c sheet Midde (upstairs building) and that the said construction is obstructing the development of the Chintareddypalem road and the canal construction

and that, therefore, the writ petitioner is required to remove the said encroachment within seven days from the date of receipt of the said notice and that on failure to comply with the demand in the notice, the Corporation will remove the encroachments without any further notice and also recover costs in that regard as per law from the writ petitioner. To the said notice, the writ petitioner had submitted an explanation dated 25.10.2010 stating that his daughter is the owner of the building and that the building was constructed as per the approved plan and that the building was assessed by the Municipality to property tax and that the building is situated in a private property and that there is no encroachment whatsoever of any poramboke as claimed in the notice of the Corporation and that the Chinthareddypalem Irrigation channel on the South of the subject building does not vest in the Municipal Corporation and that the Municipal Corporation has no right in the irrigation channel, which is owned by the Department of Irrigation or Revenue. Feeling aggrieved of the action of the Corporation in proceeding to demolish the subject building of the petitioner's daughter without passing any speaking order on the explanation submitted to the notice, the writ petition is filed.

4. The respondent-Corporation had filed a counter stating that it is a fact that D.Mahitha, the daughter of the writ petitioner, had obtained approved plan from the respondent-Corporation for construction, that is, the extension of the first and second floors of the residential building vide B.A.no.885/2003/G2 dated 13.10.2003 and that the enquiries of the Corporation had revealed that the said D.Mahitha and D.Anil Kumar Reddy, her husband, are staying at USA and that the writ petitioner is the GPA holder of his daughter-D.Mahitha and that while constructing the building, the petitioner had deviated from the approved plan and had made constructions encroaching the channel pramboke in S.No.869 to an extent of 815 square feet, that is, 24'-0" on the Eastern side, 29'-0" on the Western side, 30'-9" on the Southern side and 30'-6" on the Northern side of the building and that the Corporation, for public purpose and for the free flow of traffic, had proposed to develop Chinthareddy Palem Road (Childrens' Park Road), which is an important major link road to National Highway-5 from Mini by-pass road, with

an estimated cost of Rs.7.30 Crores and that at that time a survey was conducted and the alignment was marked and notices were issued to the owners concerned under Sections 405 and 406 of the Hyderabad Municipal Corporation Act, 1955 and that the encroachments made were removed during the period from 22.01.2011 to 25.01.2011 and that the said activity was widely reported in the press and that since this Court had directed in W.P.no.21009 of 2010 to follow due process of law, this respondent had issued notice dated 23.10.2010 to the petitioner and that the petitioner had submitted a reply dated 25.10.2010 and that it is proposed to remove the encroachment only for the purpose of widening of the childrens' park road and that the irrigation channel poramboke vests in the Municipal Corporation and that the writ petitioner had encroached channel poramboke site to an extent of 815 square feet and that since the petitioner had encroached the site, which is a channel poramboke, no acquisition proceedings are necessary and that the provisions of the Land Acquisition Act do not apply to the encroached site and that the encroachment portion of the petitioner's building could not be removed in view of the interim orders of this Court dated 28.01.2011.

5. The learned counsel for the petitioner while submitting the chronology of events and while reiterating the case of the petitioner, which is already stated supra, would further submit that if any building is constructed in deviation of the approved plan, the Municipality has to issue notice under Section 452 of the Municipalities Act and that Sections 405 and 406 are not applicable to the case on hand, and that in any view of the matter, the irrigation channel poramboke vests in the irrigation department and the same does not vest with the Municipality and that there is no consistency in the case of the Municipal Corporation.

6. The learned Standing Counsel appearing for the respondent-Municipality would submit that though the building plan was approved, the constructions were made deviating from the approved plan and that this Court in the earlier writ proceedings had passed orders requiring the respondent-Corporation to issue notice and follow due procedure under law if the subject

building or any part thereof is required to be demolished for any public purpose and that in the present context, the case of the Corporation is that the petitioner made constructions as stated in the subject notice dated 23.10.2010 by encroaching a part of the irrigation channel poramboke and that for the removal of the encroachment of the irrigation channel poramboke, a notice invoking the provisions of Sections 405 and 406 of the Hyderabad Municipal Corporation Act was appropriately issued and that since the constructions were made by encroaching the irrigation poramboke channel, no acquisition of property is necessary under the provisions of the Land Acquisition Act for removal of such encroachment and that such procedure for acquisition has to be followed, if only the private property is required to be demolished for any public purpose like road widening or canal development and that in view of the interim orders of this Court dated 28.01.2011, the Municipality shall not demolish the constructions that were made by the petitioner in accordance with the sanctioned plan dated 13.10.2003, but, it is open to the Municipal Corporation to remove any constructions over and above what was permitted under the said approved plan and also any constructions, which were made by encroaching into the neighboring land, and that therefore, the respondent-Municipality may be given liberty to proceed in accordance with the procedure established by law.

7. I have given detailed and thoughtful consideration to the facts and the submissions.

7.1 The daughter of the writ petitioner is the owner of the subject building and the construction was made after obtaining sanction of the approved plan from the Municipal Corporation is not in dispute. A perusal of the copy of the plan would show that for construction of the ground floor, permission was obtained in the year 1993 and therefore, the ground floor was shown as existing ground floor and that for extension, that is, for the construction of 1st and 2nd floors, permission and approval was obtained in the year 2003, vide Proceeding B.A.No.885/2003/G2 dated 13.10.2003. It is admitted that to the South of the said building consisting of ground, 1st and 2nd floors, there is an

irrigation channel and that to the further South of it, there is a 60 feet wide road. Both the learned counsel had fairly submitted that if the subject building or any part thereof is required to be demolished for public purpose, the respondent shall issue notice to its owner and follow due process of law, not only as per Rule of Law but also in view of the directions of this Court in the orders dated 24.08.2010 made in W.P.no.21009 of 2010. But, in the present *lis*, the Municipal Corporation claims that the construction, namely, RCC Midde A/c sheet (RCC upstairs with AC sheet) was constructed after encroaching into the Chinthareddypalem Kaluva poramboke site. However, in the notice dated 23.10.2010, the Municipality had stated that the said poramboke is in sy.no.870 and the extent occupied or encroached upon is 11X32=352 whereas, in the counter affidavit, it is stated that the channel poramboke is in sy.no.869 and that the encroachment is to an extent of 815 square yards, i.e., 24'-0" on the Eastern side, 29'-0" on the Western side, 30'-9" on the Southern side and 30'-6" on the Northern side of the building. Though it is also stated that a sketch showing the encroachment and the existing building, which is submitted by the Town Surveyor, is filed along with the counter, no such sketch is admittedly enclosed to the counter affidavit filed into Court. Thus, when the contents of the notice dated 23.10.2003 issued by the Municipal Corporation on one hand and the contents of its counter affidavit are examined in juxtaposition, it is evident that there is no consistency in regard to the survey number of the poramboke and also the extent and the measurements of the encroachment said to have been made by the petitioner. As already noted, sketch showing the encroachment purported to have been prepared by the Town Surveyor is also not enclosed to the counter. It is not the case of the Municipality that after receiving the explanation from the writ petitioner, any order, much less a speaking order was passed duly giving an opportunity of hearing to the petitioner.

8. Having regard to the facts that emerge from the discussion *supra* coupled with reasons, this Court deems it appropriate to dispose of the writ petition with the following directions:

- (i) If the subject building or any part thereof is required to

be demolished for any public purpose like road widening or development of the irrigation channel, the respondent-Corporation shall issue notice to its owner and follow the procedure established by law;

(ii) If the Municipal Corporation considers that any constructions are made by encroaching upon the Chinthareddypalem kaluva Poramboke site by the writ petitioner or his daughter, the Municipality shall cause a fresh notice with correct details to be served on the concerned giving sufficient and required time to show cause and then consider and dispose of the explanation, if any, submitted in reply to such notice that may be caused to be served and shall take further steps, if necessary and warranted, for the removal of any such encroachment in strict accordance with the procedure established by law.

(iii) It is made clear that without strictly following the procedure established by law no part of the subject building shall be demolished either on the ground that the canal/channel poramboke site is encroached upon or on the ground that a part thereof is required to be demolished for any public purpose.

9. The writ petition is disposed of accordingly. There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

05th February 2016
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