

HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

Writ Petition Nos. 5797, 5798, 5803, 5805 and 5806 of 2012

Common Order:

These five Writ Petitions are being disposed of by this common order as they arise out of the common cause of action.

The petitioners state that the land where building bearing No.18-13-4, situated at Chandrayangutta X Road, Hyderabad is of an extent of more than 1 ½ Acres. In Ac.1.00 of land a function hall was constructed in the year 1997 after obtaining permission from the Municipal Corporation of Hyderabad. Another permission was obtained under Permit No.118/43/99 for construction of ground, first and second floors in the land of an extent of 570 sq. yards facing the main road. In the second floor of the said building a Mosque was constructed. A hotel is being run in the name of "Omar Hotel" in the ground floor. The balance area facing the main road was divided into four portions of 350 sq. yards each and it was gifted by the owner to his wife and three minor sons. After dividing the property and gifting to them, applications were made for construction of four buildings with ground + 2 upper floors, ground floor for commercial and floors 1 and 2 for residential purposes and the building permissions bearing Nos.185/15, 184/16, 184/17 and 184/18 dated 24.05.2007 were granted. The construction was commenced after issuing notice under Section 440 of the Hyderabad Municipal Corporation Act, 1955 (for short 'the Act') on 04.06.2007. After commencement of the construction, the Municipal Corporation issued a notice under Section 685 of the Act on 11.10.2007, challenging which the petitioners filed O.S.Nos.7913, 7914, 7915, 7917 and 7918 of 2007 in the Court of VI Junior Civil Judge, City Civil Court, Hyderabad seeking permanent

injunction on 20.12.2007. The said suits were decreed on 28.08.2009 restraining the Hyderabad Municipal Corporation from interfering with the said property except in accordance with law. When the above suits were pending, the Hyderabad Municipal Corporation Act, 1955 was amended by incorporating Section 455-AA empowering the Commissioner to regularize the unauthorized constructions of the buildings and the Government issued G.O.Ms.No.901, MA, dated 31.12.2007 making rules called "The Andhra Pradesh Regulation and Penalization of Unauthorizedly Constructed Buildings and Buildings Constructed in Deviation of the Sanctioned Plan Rules, 2007". The said rules were amended subsequently by G.O.Ms.No.112 dated 01.01.2008, G.O.Ms.No.2 dated 02.01.2008 and G.O.Ms.No.395 dated 17.06.2009. Since the petitioners noticed that there were some deviations while making constructions, they applied for regularization under the Rules on 29.04.2008. When the said applications were pending, the petitioners received notice dated 25.07.2011 under Section 636 of the Act directing removal of unauthorised constructions and the deviations were specified in the notice. It was stated in the said notice that the BPS applications were rejected on 11.10.2010, though the petitioners did not receive such orders of rejection. Challenging the same, the petitioners filed W.P.No.22961 of 2011 and this Court, by order dated 16.08.2011, observed that the notice under Section 452 of the Act was not issued to the petitioners and in the absence of service of such notice, a notice under Section 636 of the Act could not be sustained. With regard to rejection of the applications for regularization, in view of non-service of the said orders on the proper persons, it was held that the petitioners were denied the opportunity of filing appeal against the orders of rejection and accordingly set aside the notice issued under Section 636 of the Act

and directed the service of the orders of rejection of their applications for building regularization on the petitioners. After disposal of the above Writ Petition, an order was passed on 04.02.2012 by the Assistant City Planner rejecting the applications under building penalization scheme mainly on the ground that the construction was made jointly with other four owners without maintaining setbacks as approved in the sanctioned plan and the application for regularization was made only for third floor and common staircase was shown to all the four properties including the Mosque way. The said orders of rejection are challenged mainly on the ground that the Assistant City Planner has no jurisdiction to issue the order of rejection in exercise of the powers under Section 455-AA of the Act and the Rules made thereunder.

The said point was not raised in the earlier round of litigation, even though the same was available to the petitioners. Though, they are precluded from raising such a plea in the present round of litigation, since the issue goes to the root of the matter the said point was considered by this Court.

It is clear from the facts that the petitioners individually applied for building permission and permission was granted for construction of residential building consisting of ground + 2 upper floors (10 meters height), the individual permissions were taken aid and joint construction was made by four owners without maintaining setbacks. When rules were made as aforesaid, in exercise of the powers conferred under Section 455-AA of the Act, they applied for regularization of unauthorised constructions. Whether those constructions can be regularized or not it is for the Municipal Commissioner to apply his mind and take a decision. Section 455-AA of the Act reads as follows.

“455-AA. Regulation and penalization of construction of buildings in deviation of sanctioned plan:- Notwithstanding anything in the Act, the Municipal Commissioner may regulate and penalize the constructions of buildings, made by the owner, or by an individual as the case may be, unauthorisedly or in deviation of the sanctioned plan as on the date of commencement of the Andhra Pradesh Municipal Laws and Urban Areas (Development) (Second Amendment) Act, 2008 as a one time measure, as per the procedure and by levying such penal amount as may be prescribed and upon payment of such amount all pending or contemplated proceedings and action of enforcement shall be deemed to have been withdrawn and the competent authority shall issue necessary Occupancy Certificate to the owner or the individual as the case may be.”

Even though a stand is taken by the respondents in their para-wise remarks that the power was delegated by the Commissioner under Section 119 of the Act on the Deputy Commissioner to exercise the powers of the Commissioner, no such written delegation is produced before this Court. Even otherwise also a reading of Section 119 of the Act makes it clear that the powers exercisable by the Commissioner in regular discharge of his duties can be exercised by other officers when the Commissioner generally or by special orders empowers such officers in writing, but the exercise of such general power by virtue of delegation under Section 119 of the Act cannot be extended to the power to be exercised by the Municipal Commissioner specified in Section 455-AA of the Act. The power conferred on the Municipal Commissioner under Section 455-AA of the Act is a special power enacted to examine the individual cases of unauthorised constructions and to pass individual orders by applying his mind. In discharge of such a duty, the Commissioner may be guided by the officers subordinate to him, but the ultimate application of mind is that of the Municipal Commissioner who alone can take a decision. If such a power is conferred on the Municipal Commissioner in order to prevent misuse of power and arbitrary exercise of power by the subordinate

officers, the said power conferred on the Municipal Commissioner under Section 455-AA of the Act cannot be delegated. Against the orders of the Commissioner an appeal is provided under the Rules and though initially the Commissioner was made as Chairman of the Appellate Committee subsequently the rules were amended by removing the Commissioner as Chairman of the Appellate Committee as the initial order has to be passed by him. In view of the existence of the said rules and the provision of law, in the case of unauthorized constructions or constructions made in deviation of the sanctioned plan, those applications have to be disposed of before exercising the power under Sections 452 and 636 of the Act.

In view of the above provisions, the impugned orders passed by the Assistant City Planner, Circle No.IV, South Zone, GHMC dated 04.02.2012 are set aside and the matters are remanded to the Commissioner, GHMC for passing appropriate orders in accordance with law within a period of three (3) months from the date of receipt of a copy of this order. Till such time, no action shall be taken for demolition of the structures erected by the petitioners.

All the five Writ Petitions are, accordingly, allowed to the extent indicated above. There shall be no order as to costs.

As a sequel thereto, the miscellaneous petitions, if any, pending in these Writ Petitions shall stand closed.

A. RAMALINGESWARA RAO, J

Date: 20.12.2016
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