

HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

Writ Appeal No.345 of 2018

JUDGMENT: (per Hon'ble Smt. Justice Kongara Vijaya Lakshmi)

This appeal, under Clause 15 of the Letters Patent, is preferred against the order dated 02.01.2018 passed by the Learned Single Judge in WP MP Nos.27054, 27055 and WV MP No.3615 of 2017 in WP No.21969 of 2017, wherein, the *status-quo* orders granted on 04.07.2017, were extended till the disposal of the Writ Petition.

Heard Sri S. Niranjana Reddy, Learned Senior Counsel appearing on behalf of Ms. A. Divya, Learned counsel for Appellant, Sri B. Vijayasen Reddy, Learned counsel for Respondent Nos.1 to 5-Writ Petitioners and Sri Sampath Prabhakar Reddy, Learned Standing Counsel for respondent Nos.6 to 9, and the Writ Appeal is being disposed of at the stage of admission with their consent.

The appellant is the 5th respondent, Respondent Nos.1 to 5 are the Writ Petitioners, and Respondent Nos.6 to 9 are Respondent Nos.1 to 4 in WP No.21969 of 2017. For the sake of convenience, the parties to this appeal are hereinafter referred to as Writ Petitioners and respondents as they are arrayed in the Writ Petition.

The petitioners filed the Writ Petition seeking writ of *mandamus* to declare the action of the respondents in issuing notices dated 29.06.2017 and dated 30.06.2017, as illegal, arbitrary, unconstitutional and contrary to the provisions of the

Greater Hyderabad Municipal Corporation Act 1955 (for short 'the Act') and consequently set aside the same. A further direction was sought, not to interfere with the petitioners peaceful and uninterrupted possession over the property in premises bearing No. 8-2-322 situated at Road No.3 Banjara Hills Hyderabad.

The case of the Writ Petitioners, to the extent it is necessary, is that they are the absolute owners and possessors of the premises bearing H.No.8-2-322, Road No.3, Banjara Hills, Hyderabad, having purchased the same in the year 1985 vide registered sale deeds; subsequent to purchase, with intent to construct group houses, they approached the Municipal Authorities and obtained permission on 06.01.1988 for construction of houses; the petitioners earmarked 30 ft. road within the subject property, which road was to be used as an internal road for the petitioners to have access (ingress and egress) to their respective property; the said road was laid by the petitioners; since then they have been enjoying the said road; they also built a gate to prevent unauthorized access into the petitioners private property; when certain individuals attempted to trespass in to the subject property, the Writ Petitioners made a representation dated 27.06.2012 to the 3rd respondent; they received a notice dated 22.05.2017 from the 4th respondent stating that the Writ Petitioners unlawfully erected a gate at the entrance of the premises and directed to remove the gate forthwith; the Writ Petitioners made a representation dated 31.05.2017 to the 3rd respondent and others; they received another notice dated 29.06.2017 which was affixed on the premises on 30.06.2017

wherein they have stated that the representation of the Writ Petitioners dated 27.06.2012 was rejected; the 4th respondent issued another notice dated 30.06.2017, wherein the 4th respondent informed the Writ Petitioners that in view of the said 30 ft. road laid by the petitioners, being treated as G.H.M.C. property, the Writ Petitioners were directed to remove their encroachment i.e., the gate and compound wall within 24 hours; the respondents visited the subject property at 5 p.m. on 01.07.2017 and informed them that if the gate and the compound wall were not removed by the next date, the respondents would have to forcibly remove the same on the morning of Monday i.e., 03.07.2017; the said notice dated 29.06.2017 is contrary to Section 395 of the Act and the respondents did not follow the procedure laid down under the Act.

The Writ Petition came up for admission on 04.07.2017 and the Learned Standing Counsel for GHMC submitted that the Writ Petitioners have obtained individual permissions, and as such, the stretch on which the compound wall was constructed vests in the Municipal Corporation and they cannot make any construction over the said land and that already the said compound wall was demolished.

After hearing both the sides, the Learned Single Judge on 04.07.2017, granted *status-quo*, obtaining as on that day. The said *status-quo* order was being extended from time to time.

The Appellant-5th Respondent filed WP MP No.27930 of 2017 seeking to implead her as 5th respondent in the main Writ Petition. The said petition was ordered on 16.08.2017 and the 5th

respondent filed WV MP No.3615 of 2017 seeking to vacate the above mentioned *status-quo* order granted on 04.07.2017.

In the affidavit filed along with the vacate stay petition, the Appellant-5th respondent to the Writ Petition stated that she had purchased the property bearing Municipal H.No.8-2-545, Road No.7, Banjara Hills, Hyderabad on the strength of the records maintained by the Municipal Corporation indicating a public road available to the north-eastern side of the 5th respondent's property, she has purchased the said property, vide sale deed dated 06.05.2011; the sale deed shows the access to the said property from the said public road; and had applied to Municipal Corporation for approval of construction by indicating the said access approach road from the north-eastern side; the Writ Petitioners after denoting and indicating the subject road as a public road in the approvals obtained by them, surreptitiously constructed a compound wall on the said road blocking the access to the neighbouring plot; as the 5th respondent was making construction, she requested Respondent Nos.1 to 5 to remove the wall; as the Writ Petitioners were refusing to remove the said encroachment made by them on public street, the 5th respondent made a complaint to the Municipal Corporation of Hyderabad who, in turn, initiated legal steps for removing the encroachments on the public street in terms of its statutory duty and powers available to it; the said action has been questioned in the Writ Petition without impleading the 5th respondent as a party, though she is a proper and necessary party; the Writ Petitioners suppressed the fact of demolishing the encroachment on public street on

03.07.2017, though the Writ Petition was filed on 04.07.2017 on wrongful representation that the property was developed only under a group housing scheme; the Writ Petitioners have also failed to disclose that, they had thereafter applied for individual house permission demarcating and indicating the subject road as a road and showing the road as the road for access for such individual houses; the averment that as the Writ Petitioners were building houses they have earmarked 30 ft. wide road within the subject property, which road was used as internal road for the petitioners is incorrect; the Writ Petitioners have failed to refer to the individual building permission obtained by them by showing the said 30 ft. road as a separate access road; the said 30 ft. road is a public road and all public roads under the Act, vests with the GHMC and no individual can claim ownership over such road; the said 30 ft. road is the only road which provides access to her property and the said road has been shown as a public road in the building plan and also in the plans obtained by the petitioners and prays to vacate the said interim order.

A counter affidavit has been filed by the official respondents categorically stating that the road in question is a public road and that the individual permissions were granted to the Writ Petitioners showing the road in question as a public road.

After hearing both sides and perusing the material on record, the Learned Single Judge by order dated 02.01.2018 disposed of WP MP Nos.27054 and 27055 of 2017 extending the *status quo* order till the disposal of the Writ Petition and dismissed the WV MP No.3615 of 2017. The Learned Single Judge referred to the rough

sketch and observed that the subject road was being used exclusively by the Writ Petitioners and that there is a wall separating the bottom half portion of the properties from the upper half and that subject road was being used exclusively by five plot owners is undisputed. Aggrieved by the same, the 5th respondent in the Writ Petition preferred the present appeal.

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the Appellant-5th Respondent, submits that the subject road was demolished by the official respondents on 03.07.2017 itself and the Writ Petition was filed by way of Lunch Motion before the Learned Single Judge on 04.07.2017 stating that the Municipal Authorities were trying to demolish the compound wall, by suppressing the fact that the compound wall was demolished on 03.07.2017 itself; that the unofficial respondents have obtained permission for construction of houses under Group Housing Scheme in 1988 but subsequently obtained individual building permissions with separate compound walls in the year 1994 onwards indicating the subject road as a public road in the approvals obtained by them; that the building permission was obtained by the appellant-5th respondent on 28.03.2012 showing the only access to her house as 30 ft. public road and that due to the compound wall constructed by the Writ Petitioners blocking the road, the entire construction of the appellant came to stand still; in those circumstances, the appellant gave a complaint to the Municipal Authorities, which resulted in issuance of notices under Sections 402 and 405 of the Act to the petitioners and subsequent demolition of the same, for the purpose of this Appeal, he

presumes the subject street as a private street; no obstruction can be made to a street, whether it is a public street or private street and the GHMC is empowered to remove the said obstruction under Section 405 of the Act; as the word used is 'street' in Section 402 and Section 405 and not 'public street'; he relies upon Section 405 of the Act and contends that the Commissioner may, without notice, cause to be removed, any structure, whether of a permanent or a temporary nature which is erected over any street and in exercise of the said power, the official respondents have removed the said compound wall; and that the Learned Single Judge did not deal with Sections 397 to 405 of the Act.

On the other hand, Sri B.Vijayasen Reddy, Learned Counsel appearing on behalf of the Writ Petitioners would contend that even at the time of purchase of the said plot, marked in the plan as exhibit A2, the appellant is aware that there is no access to her land through the said street and she has obtained permission for construction of the building by showing the said street as a public road, but, whereas, in the sale deed executed by her vendee on 06.05.2011, a recital has been made stating that 'whereas the vendee has requested the vendor to sell the property with entrance from the north side as she has obtained the consent of the property owners on the north side for ingress and egress. Whereas both the vendor and vendee further agreed that no other ingress and egress will be given to the vendees other than the entrance from the north side as requested by the vendee'; it is not a public road and if it is a public road, there is no road for the appellant to obtain consent from the vendors; the Appellant-5th Respondent

purchased the property knowing fully well that there is no ingress and egress to the subject property and the entire construction has been made in exhibit A.2 by using the other road.

After the matter is reserved for orders, the Learned Counsel for the Writ Petitioners sought permission of the Court on 13.03.2018 to file written submissions. As the counsel for the appellant was not present in the Court, the matter was posted for 'for being mentioned' on 14.03.2018 and all the counsels for the parties submitted written submissions thereafter.

The Learned counsel for the Appellant-5th Respondent in the Writ Petition, submitted written submissions, stating that (a) as the Writ Petitioners obtained individual permissions showing the subject road, in the years 1994 and 1995, the said road assumes the character of public road; (b) no construction or obstruction can be made on the 'road' whether it is a public road or private road, in accordance with Section 402 of the Act, and if it is done it can be removed under Section 405 of the Act; and (c) Learned Single Judge proceeded on the basis of it, being a private road and did not deal with Sections 397 to 405 of the Act.

The Learned Counsel for the Writ Petitioners submitted written arguments contending that (a) impugned proceedings dated 29.06.2017, issued by the GHMC, Notice dated 22.05.2017 were issued under Sections 402 and 405 of the Act; and does not refer to provisions under Sections 397 to 401 of the Act; (b) in the complaint given by the Appellant, on 16.05.2017, it is not stated that the private street is converted into public street; (c) only

allegation in the complaint is that compound wall is constructed encroaching the public road; (d) it is not the case of the GHMC that private road is being converted into public street for the benefit of public; (e) it is not the case of the appellant that she has requested the private street to be used as public street; (f) except the appellant, no other person has any interest in the subject road; (g) it is not the case of the appellant in the implead petition that private street is being converted into public street in public interest, by GHMC; (h) no reference in implead petition as to the provisions of Sections 397 to 405 of the Act; (i) reference to Sections 388 to 405 of the Act in the arguments do not have foundation in the pleadings; (j) no basis in pleadings or complaint regarding public street/private street; and (k) no foundation in pleadings with regard to conversion of private street to public street by virtue of Sections 388 to 396 of the Act.

Learned Standing Counsel for the GHMC-respondent Nos.7 to 9 submitted written submissions contending (a) Writ Petitioners obtained permission under Group Housing Scheme in 1988; they did not act on that and subsequently in the year 1994 and 1995, they obtained individual permissions showing it as road; (b) the Writ Petitioners suppressed the fact of individual permissions; and Section 405 of the Act empowers removal of encroachment whether on private street or public street.

As the written submissions are at variance with the oral submissions, the matter was listed under the caption 'for being mentioned'. The Learned counsel for the Appellant Sri S.Niranjan Reddy submitted that for the purpose of this appeal, it would

suffice for the Court to consider whether the provisions of Section 405 of the Act, would be attracted, even if subject road is presumed to be a private road; and whether a compound wall can be raised upon a private road. The counsel for the Writ Petitioners Sri B. Vijayasen Reddy submitted that in the light of the aforesaid submission of Sri S.Niranjan Reddy, it may be unnecessary for this Court to examine the contention, in the written submissions filed on behalf of the respondent Nos.1 to 5-Writ Petitioners, that the plea of a private road having been converted into a public road is not supported by the pleadings of the appellant-5th respondent in the counter-affidavit filed by them in the writ petition.

Chapter-XI of the Greater Hyderabad Municipal Corporation Act, 1955 relates to regulation of streets, and under the head *“construction, maintenance and improvement of public streets”* is Section 373 which relates to vesting of public streets in the Corporation. Section 373 stipulates that all streets within the city, being or which at any time become public streets and the pavements, stones and other materials thereof, shall vest in the Corporation and be under the control of the Commissioner. Section 374(1) stipulates that the Commissioner shall, from time to time, cause all public streets vested in the Corporation to be levelled, metalled or paved, channelled, altered and repaired, as the occasion shall require; he may also, from time to time, widen, extend or otherwise improve any such street or cause the soil thereof to be raised, lowered or altered and may place and keep in repair fences and posts for the safety of pedestrians. Section 374(2) enables the

Commissioner, with the sanction of the Corporation, to close the whole or any part of a public street vested in the Corporation.

Section 374-A confers power on the Government to repair the public streets vested in the Municipal Corporation. Section 376 enables the Commissioner, when authorised by the Corporation in this behalf, at any time to (a) lay out and make a new public street; (b) agree with any person for the making of a street for public use through the land of such person, either entirely at the expense of such person or partly at the expense of such person and partly at the expense of the Corporation, and that such street shall become, on completion, a public street which shall vest in the Corporation; (c) to declare any street made under any scheme of the City Improvement Board to be a public street. Section 377(1) enables the Corporation, from time to time, to specify the minimum width for different classes of public streets according to the nature of the traffic likely to be carried thereon etc. Section 379(1) confers power on the Corporation to prohibit use of public streets for certain kinds of traffic, and Section 380 enables the Commissioner to acquire premises for improvement of public streets.

Chapter-XI also contains provisions concerning private streets. Section 388(d) requires every person, who intends to make or lay out a private street whether it is intended to allow the public a right of passage or access over such street or not, to give a written notice of his intention to the Commissioner along with an affidavit declaring the total extent of land held, and to submit plans, among others, of the site of the private street. Section

391(1) stipulates that the level, direction, width and means of drainage of every private street, the kind and number of trees to be planted and reared besides such streets and the height and means of drainage and ventilation of, and access to all buildings to be erected on such land or on either side of, such street shall be fixed and determined by the Commissioner subject to such general directions as the Standing Committee may give in this behalf, from time to time, with the general object of securing sanitary conditions, amenity and convenience in connection with laying out and use of any neighbouring lands, and also with the object that the proposed private street may not conflict with any arrangements which have been made or which are, in the opinion of the Commissioner, likely to be made for carrying out any general scheme of new streets or of improvement of existing streets in the locality. Section 394 provides that, if any private street be not levelled, metalled, flagged or paved etc to the satisfaction of the Commissioner, he may, with the sanction of the Standing Committee and by written notice, require the owner or owners of the several premises fronting or adjoining the said street or other means of access or abutting thereon or to which access is obtained through such street or other means of access or which will benefit by the works executed under this Section, to carry out any one or more of the aforesaid requirements in such manner as he may direct.

Section 395 relates to the power to declare private streets as public streets and, thereunder, when any private street has been levelled, metalled, flagged or paved, sewered, drained, channelled,

and made good to the satisfaction of the Commissioner, he may and, upon the request of the owners or of any of the owners of such street, shall, if lamp posts and other apparatus necessary for lighting such street have been provided to his satisfaction and if all land revenue payable to the Government in respect of the land comprised in such street has been paid, declare the same to be a public street by notice in writing put up in any part of such street, and thereupon the same shall become a public street and vest in the Corporation as such.

The aforesaid provisions make a clear distinction between a public street and a private street. While a public street vests in the Corporation under Section 373 of the Act, and the Commissioner is empowered under Section 374(1) to level, metal or pave, channel, alter and repair public streets, Section 388(d) appears to indicate that private street can be made or laid wherein the right of maintenance, and the use over such street may or may not be allowed to the public. Accepting the submission of Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellant, that the general public would have the right of free passage over all private streets, may well render the words "*or not*" in Section 388(d) redundant. Judicial notice can be taken of the fact that several gated communities in and around the twin cities have internal streets to which the general public are not provide free and unrestricted access. Accepting the submission of Sri S. Niranjan Reddy, Learned Senior Counsel, may well require free and unrestricted access to the streets, located within these gated communities to be provided to general public, and in such gated

communities being disabled from erecting gates or compound walls across such streets which, until now, are bounded by outer gates and compound walls which may well result in bring to an end the very concept of private gated communities.

It is no doubt true that Section 405(a) confers power on the Commissioner, even without notice, to remove any wall or fence erected or set up in or over any street and, unlike the earlier provisions, Section 405(a) uses the words “*any street*”. While Sri S. Niranjan Reddy, Learned Senior Counsel, would submit that Section 405(a) confers power on the Commissioner to remove compound walls laid, and gates erected, across both public and private streets, placing such a construction upon Section 405(a), may then eliminate the distinction between a “*public*” and a “*private*” street.

It is useful, in this context, to note that the compound wall erected by the respondent Nos.1 to 5-writ petitioners is at the end of the private street, and separates the appellant's lands from those of the respondent Nos.1 to 5-writ petitioners. It is not as if the land, on the other side of the compound wall, which belongs to the appellant, is a continuation of the private street. The question which would also necessitate examination is whether such a compound wall would also fall within the ambit of Section 405(a) of the GHMC Act, conferring power on the Commissioner to remove it without notice. The question whether the drastic power conferred by Section 405(a) on the Commissioner, to remove any kind of obstructions on a public street without even issuing a notice, is

available to be exercised even with respect to a private street also necessitates examination when the Writ Petition is finally heard.

It does not appear to be in dispute that both the gate erected, and the compound wall raised, on the two sides of the subject street, have been in existence for the past more than 30 years, and for all these thirty and odd years neither the vendors of the appellant, nor the appellant thereafter, have been provided access through this street to enter their land. They have, all through, had independent access to their land from a different point of entry. It is only after they had constructed villas, in a part of their land, have the appellant now put forth this claim of the general public having the right of unrestricted access to these private streets, allegedly because access through the subject street would enable them to enter their land from its north-eastern corner which is widely perceived as being auspicious. As noted hereinabove the compound wall, raised at the end of the subject street, was in existence for nearly 30 years till it was demolished just a day before the present Writ Petition came to be filed.

The very fact that, in the sale deed executed in their favour by their vendors, the appellant have stated that permission of the respondent Nos.1 to 5-writ petitioners would be obtained by them for securing access to their land, through the subject private street, would also go to show that even the appellant, when they purchased the lands on the other side of the compound wall, were of the view that they did not have the right of free and unrestricted access to the subject street laid on the other side of the compound wall whereby the appellant land is separated from that of the

respondent Nos.1 to 5-writ petitioners. We may not be understood to have held that the appellant understanding, of the provisions of the GHMC Act, is conclusive for, if the law were to confer the right of free and unrestricted access over all private streets to the general public, the appellant's understanding to the contrary would be of little consequence.

As the scope of these provisions of the GHMC Act, and the distinction between a "*public street*" and a "*private street*", in the context of the right of the general public to have free and unrestricted access thereto, does not appear to have been examined by this High Court so far, it would be inappropriate for us to decide these and other questions, which arise for consideration, in the present appeal preferred against the interlocutory order passed by the Learned Single Judge. Suffice it to hold that these questions necessitate detailed examination in the Writ Petition. We may not be understood to have held either that the general public have, or they do not have the right of unrestricted access to private streets as this and other related issues need to be examined by the Learned Single Judge, in the first instance, when the Writ Petition is finally heard. Suffice it to record our satisfaction that the Learned Single Judge was justified in not undertaking an elaborate examination, of the scope of these provisions, at the interlocutory stage of the Writ proceedings. We see no reason, therefore, to interfere with the order of the *status-quo* passed by the Learned Single Judge. Suffice it to make it clear that the Learned Single Judge shall, when the Writ Petition is finally heard, examine the contentions urged, both on behalf of the

appellant and the respondent Nos.1 to 5-writ petitioners, on its merits uninfluenced by any observations made either in the order under appeal or in the order now passed by us.

The Writ Appeal fails and is dismissed accordingly. No order as to costs. Miscellaneous petitions, if any, pending in this Writ Appeal, shall stand closed.

RAMESH RANGANATHAN, ACJ

KONGARA VIJAYA LAKSHMI, J

Date: 03.04.2018
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HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

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(per Hon'ble Smt. Justice Kongara Vijaya Lakshmi)



Date: 03.04.2018

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