

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.20294 of 2018

ORDER:

Initially, this writ petition came to be filed, questioning the Memo No.7437/M1/2017 dated 15.7.2017 issued by the State Government/1st respondent herein as furnished to the 1st petitioner by 4th respondent/Tahsildar, Musheerabad under File No.D/969/2018 dated 13.4.2018 and for a direction to the respondents not to undertake any activity including construction of any unauthorised structures or 2 BHK Apartments and for a consequential direction for restoration of the park.

2. Vide orders dated 29.6.2018 and 9.7.2018 passed in I.A.Nos.3 and 4 of 2018, the main relief portion came to be amended with the following prayers by way of insertion:

“To hold that the notification under Section 3(1) of the A.P. Slum Improvement (Acquisition of Land) Act, 1956 as published in A.P. Gazette dated 12.4.1984 has no application to the subject park area admeasuring 145' x 65' covered by layout bearing No.66/60 in File No.246/BPS/2/60; and

To declare G.O.Ms.No.17, Municipal Administration and Urban Development (Plg.1(1)) Department dated 29.1.2018 as arbitrary, capricious and violative of Articles 21, 49 and 51-A(g) of the Constitution of India and without any jurisdiction and not maintainable against the park area admeasuring 145' x 65' opposite to the west of road to H.No.1-3-1/14”.

3. By way of order dated 9.7.2018 in I.A.No.4 of 2018 in addition to the above said amendments, this Court also permitted the petitioners to add paragraphs 22-E to 22-H after paragraph 22-D of the main writ affidavit.

4. Briefly stated, the case of the petitioners as per the pleadings available on record is as follows:

4.1 The land covered by Municipal No.1-3-3 admeasuring Ac.1-26 guntas of Kavadiguda was originally owned by one Sri Y.Govindu S/o Pullaiah and he obtained layout No.66/60 from MCH vide File No.246/BPS/2/60 by dividing the land into 52 plots and showing 140' x 65' area as park in the midst of the layout, opposite to plots 30, 31, 32 and 33 on western side after road and bounded on North by road and plots 13 and 14 and South by road and plots 39 and 40.

4.2 First petitioner's father late Sri E.Subba Rao, purchased plot No.31 admeasuring 377.77 sq.yards vide registered sale deed bearing Document No.1418/1961 dated 3.5.1961 and made constructions after obtaining sanctioned plan and revised plan dated 4.4.1963 and 6.10.1964 in File No.513/Open/A/62 and the said plans clearly show the existence of park, abutting road on western side of the said property. Thereafter, 1st petitioner purchased the shares of others vide registered sale deeds bearing Document Nos.1490 and 1491 of 2013 dated 23.9.2013 and after demolishing old constructions, petitioners 1 and 2 obtained building permission from MCH vide File No.99586/20/12/2013/CZ, permit No.32330/ZC/CZ/Cir-9/2014 dated 28.2.2014 and constructed stilt, ground floor plus 3 upper floors and petitioners 1 and 2 are in possession of the same. Petitioners 3 to 52 are residents of neighbourhood of petitioners 1 and 2 and most of them live in apartments, surrounding the park.

4.3 The subject park area is the only lung space for the residents of the area. The Corporation, though the custodian of the park area did not

evinced any interest in properly maintaining the same and as a result, the same was encroached upon by hut-dwellers. Despite various efforts made by the residents of the colony periodically and in spite of approaching the representatives of people and despite requests made, the official respondents remained as mute spectators.

4.4 As the 1st petitioner learnt about 2 BHK scheme being attempted to be implemented in favour of slum-dwellers who encroached upon the subject park area, he approached Municipal Corporation under Right to Information Act vide application dated 17.5.2017 and the 5th respondent vide letter dated 2/5.6.2017 sought information from the Deputy Commissioner, who vide letter dated 3.8.2017 informed the petitioner that the subject matter is being dealt by Revenue Department.

4.5 When the 1st petitioner was out of station, in the second week of January, 2017, he learnt that political leaders and Government officials and GHMC laid foundation stone with a view to construct 2 BHK apartments for slum-dwellers for 55 families in an extent of 1160 sq.yards at a cost of Rs.4.57 crores instead of restoring park.

4.6 Vide letter dated 9.3.2018, the 1st petitioner sought information from Tahsildar, Musheerabad who vide File No.D/969/2018 dated 13.4.2018 replied and admitted at Serial No.A of the said information about the existence of park and the 4th respondent Tahsildar enclosed Government Memo No.7437/M1/2017 dated 15.7.2017 which confirms the proposal of 5th respondent to construct 2 BHK houses in an extent of Ac.0.032 gts.

4.7 With the above pleadings and while contending that the said action is highly illegal, arbitrary, violative of the provisions of the Constitution and the judgments of this Court and the Hon'ble Apex Court, writ petition came to be filed on 15.8.2018. Thereafter, after production of copy of the Gazette notification dated 12.4.1984 issued by the State Government under Section 3(1) of the Slum Improvement Act, 1956 by the learned Government Pleader, I.A.No.3 of 2018 came to be filed stating that it has no application and vide I.A.No.3 of 2018 the said amendment was allowed and when the respondents 5 and 6 produced G.O.Ms.No.17 dated 29.1.2018 wherein variation to land use was made, amendment was sought vide I.A.No.4 of 2018 and this Court also allowed the said I.A.

5. Counter affidavits, deposed by respondents 4, 5 and 6 have been filed, so also additional counter affidavit by 4th respondent and reply is also filed by the writ petitioner to the counter of respondents 5 and 6.

6. It is the case of the official respondents in their counter affidavits that one L.B.Nagar Tax Payers Welfare Association, representing the petitioners filed W.P.No.4663 of 1978 for a direction to the Respondent Corporation to provide basic amenities wherein MCH filed counter and the petitioner Association withdrew the said writ petition, as such, the petitioners cannot be permitted to re-agitate the same in the present writ petition. It is further stated that even on the date of purchase by Sri Y.Govindu vide Document No.2035/1956 there were hut-dwellers in an extent of 8½ guntas and Govindu sold the said land except the extent in occupation of hut-dwellers to third parties; that after the demise of Govindu, his legal representatives gave Power of Attorney to one S/Sri K.R.Jagadeesh and K.Lakshmi Narayana for

the purpose of executing and registering sale deeds in favour of hut-dwellers for an extent of 1018 sq.yards; that though the power of attorney holders executed an agreement of sale dated 4.8.1986 in favour of hut-dwellers, they could not get individual sale deeds executed and that the slum dwellers got the Agreement of sale validated under Section 42 of Indian Stamp Act on 14.11.2005 through the District Registrar, Hyderabad by paying necessary stamp duty and penalty; that the Tahsildar vide report dated 24.10.2008 informed the Revenue Divisional Officer that 26 huts exist in 897 sq.yards and balance 121 sq.yards is covered by internal roads; that the subject area was declared as slum vide notification dated 12.4.1984 under Slum Improvement Act, as such, completely vested in Government; that the Government after calling for objections, notified change of land use from open space zone to residential zone vide Memo No.7437/M1/2017 dated 15.7.2017 and final orders were passed vide G.O.Ms.No.17 MA & UD (Plg.II) Department dated 29.1.2018.

7. Submissions/Contentions of Sri M.R.S.Srinivas, learned counsel for petitioners

7.1 In the layout bearing No.66/60 sanctioned by GHMC vide File No.246/BPS/2/60, the subject land admeasuring 1081 sq.yards with dimensions 140' x 65' was earmarked as park.

7.2 Father of petitioners 1 and 2 obtained revised plans on 4.4.1963 and 22.9.1964 from MCH which also confirm the existence of park opposite to plot No.31.

7.3 The 4th respondent/Tahsildar vide Endorsement dated 13.4.2018 also categorically informed about the existence of park.

- 7.4 The impugned action is contrary to G.O.Ms.No.72 MA dated 20.2.2002, wherein Government directed no conversion of reserved open spaces for the purposes other than parks, playgrounds, community structure, urban forestry and similar eco-conservation programmes.
- 7.5 Order in W.P.No.4663 of 1978 cannot be used against the petitioners in the absence of any adjudication in the said writ petition.
- 7.6 In the notification issued under Slum Improvement Act, the subject land of 1018 sq.yards was not notified, as such, vesting of the same in Government would not arise.
- 7.7 In the Memo No.7437/M1/2017 dated 15.7.2017, proposing to correct change of land use from open space to residential use, the 4th respondent admitted that change of use of park area.
- 7.8 Respondents 5 and 6 produced G.O.Ms.No.17 dated 29.1.2018 referring to proposal of the Government to raise construction of 2 BHK houses consisting of ground plus 3 floors at the rate of 8 units in an extent of Ac.0.032 gts. which comes to 387 sq.yards and paragraph 2 of the said G.O.Ms.No.17 shows that it should be published in Telangana Gazette dated 6.2.2018 and no Gazette notification is produced, as such, negative inference will have to be drawn.
- 7.9 While issuing G.O.Ms.No.17 dated 29.1.2018, there was no compliance of sub-section (3) of Section 15 of HMDA Act, 2008.

In support of his submissions and contentions, the learned counsel for the petitioners takes the support of the following judgments:

- (1) Dr. Shyam Sunder Prasad and others v. Commissioner, MCH, Hyderabad and others¹.
- (2) Bangalore Medical Trust v. B.S.Muddappa and others².
- (3) G.N.Khajuria and others v. Delhi Development Authority and others³.
- (4) NGOs. Colony Development Committee, Machilipatnam District Collector, Krishna, Machilipatnam and others⁴.
- (5) Chinawaltair Colony House Owners Welfare Association v. Commissioner, Visakhapatnam Municipal Corporation and others⁵.
- (6) Kalasagaram (Regd.) Secunderabad Cultural Association v. State of Andhra Pradesh and others⁶.
- (7) Civil Appeal No.5606/ 10 dated 14.9.2017.
- (8) Civil Appeal No.11258/ 17 dated 24.8.2017.
- (9) Civil Appeal Nos. 9323-25 of 1994 dated 26.07.1999 - M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and others.

8. Submissions/contentions of learned Advocate General

- 8.1 There is no illegality nor there exists any procedural infirmity in the impugned action and in the absence of the same, the questioned action is not amenable for any judicial review under Article 226 of the Constitution of India.
- 8.2 A number of disputed facts raised at paragraphs 8 to 12 of the writ affidavit cannot be asked to be verified under Article 226 of the Constitution of India.
- 8.3 In view of the order in W.P.No.4663 of 1978, the issues cannot be permitted to be re-agitated.
- 8.4 Hut-dwellers have been in possession for the period prior to 1960 also and in W.P.No.4663 of 1978 petitioners did not claim any relief for removal of dwellers.

¹ 2001(5) ALD 851

² AIR 1991 SC 1902

³ AIR 1996 SC 253

⁴ 2001(1) ALD 55

⁵ AIR 2002 AP 175

⁶ 1998(1) ALD 595

8.5 There is no layout bearing No.6/60 granted by MCH and the same would be evident from the counter affidavit filed by MCH in W.P.No.4663 of 1978.

8.6 The sale deeds obtained by the petitioners and their predecessors do not contain any recitals as to the existence of any layout, as being pleaded by the petitioners and on the other hand, the said sale deeds do mention only plot numbers.

8.7 Since the Government notified the subject land under the provisions of Section 3 of the Slum Improvement Act and as the land stood absolutely with the Government, no claim can be raised against the same at this length of time and claim is barred by limitation.

In support of his submissions and contentions, the learned Advocate General places reliance on the judgement in New Bhoiguda Mosque and Grave Yard Committee v. District Collector, Hyderabad and others⁷.

9. Submissions/contentions of Sri S.Surender Reddy, learned counsel appearing for impleaded Respondents 8 to 43

9.1 Absolutely there are no bonafides on the part of the petitioners herein and the possession of Respondents 8 to 43 is not in dispute and the same would be evident from the representation dated 14.5.2001 submitted by the Welfare Association of the Colony and also the order of this Court in W.P.No.4663 of 1978 and in view of the same, petitioners herein cannot maintain the present writ petition, taking advantage of the vacation of the land by the impleaded respondents in view of construction of 2 BHK houses undertaken by the State Government.

⁷ 2002(1) ALD 790 (DB)

9.2 It is further submitted that there is no approved layout, earmarking the subject area as park area and no evidence is placed to substantiate the claim of the petitioners that the subject area is park area, which is the very basis for filing the present writ petition.

9.3 It is further submitted that instead of approaching competent Civil Court for resolution of the complicated questions of facts, the present writ petition is filed before this Court.

10. In the above background, now the issue that emerges for consideration of this Court is -

“Whether the petitioners are entitled for any relief from this Court under Article 226 of the Constitution of India ?

11. There is absolutely no controversy with regard to the reality that earlier in the year 1978, the Lal Bahadur Nagar Tax Payers Welfare Association, Regd.No.267/78, Kavadiguda, represented by its Secretary filed W.P.No.4663 of 1978 against MCH praying for the following relief:

“To issue a writ, order or direction, directing the respondent herein to provide the basic amenities in the locality covered by layout bearing Municipal No.1-3-3, Kavadiguda, Hyderabad (File T.A.No.66/60 MC/Hyd/246/BPS/2/60 covered hitherto in Y.Govindu layout and at present known as petitioners area as provided under Section 112 of HMC Act, 1955”.

12. In the said W.P.No.4663 of 1978, a counter affidavit was filed on behalf of MCH and paragraphs 3 to 10 of the said counter affidavit read as follows:

“3. On verification from the records of the respondent office, there is no layout found sanctioned in file No.T.A.No.66/60/MC/Hyd/246/BPS/2/60 in favour of Sri Y.Govindu, bearing MCH No.1-3-3, Kavadiguda, Hyderabad.

4. Regarding the allegations in para 3 of the affidavit, I submit some houses were constructed in Kavadiguda and the said owners have paid betterment charges. There are some plots still vacant for which betterment charges were yet to be paid by the respective owners. The petitioner has neither given the number and date of challan for payment of layout fees nor the number and date of permit sanctioning or releasing the layout. Similarly the petitioner has not mentioned the conditions stipulated under the sanctioned layout plan. The petitioner has not mentioned as to whether the layout was sanctioned without any conditions of stipulations. If the layout was sanctioned with any stipulations and conditions, unless the conditions so stipulated are fulfilled and the property covering the roads, open space, parks, playground etc., are handed over to the Respondent, the responsibility of maintaining them by the respondent will not arise.

5. Even in the case of payment of individual betterment charges, unless all the plot holders pay the entire betterment charges payable by them they cannot claim the amenities nor can same be provided by the MCH. Even from the admission of the petitioner in para 3 of the affidavit, there are still some more plots of land left vacant and the petitioner does not even contend that they have paid the betterment charges. Unless and until the petitioner contends that the entire betterment charges were paid and the owner of the land to whom the layout was granted has fulfilled all the stipulations and conditions of layout, the petitioner cannot claim as a matter of right, for providing amenities by the respondent.

6. Regarding the allegations in para 4 of the affidavit, I submit that the obligations mentioned in Section 112 of the HMC Act, 1955 will arise, in case in the sanctioned layout the said obligations were taken up by the respondent and not by the applicant. From and out of the betterment charges so far realised from the respective owners of the houses in the said locality the respondent has laid roads in the November 1979 spending Rs.48500/-. There are some street lights in the locality, water connections are existing in the area, one public water tap is also provided. Regarding drainage and storm water drain, the respondent has called for the tender to take up the said work on 31.10.1979.

After the tender is accepted and finalised the said works of drainage and storm water drain will be done through the contractor.

Conservancy service is also provided. It is true that some representations were made but the roads could not be laid because all the plot owners have not paid the betterment charges completely. As mentioned above from and out of the betterment charges so far received metal roads were provided and the work of Asphalting will be done in due course.

7. Regarding the allegations in para 5 of the affidavit about the existence of huts, necessary action is being taken by the respondent. Unless the owner of the layout transfers or hands over the area left for the parks and play ground to the respondent as contemplated under the Act and the rules, the respondent cannot take action for evicting the hut dwellers. Till such time, the owner of layout alone has to take necessary legal steps for evicting them. The other adverse allegations made by the petitioner in the said para are denied.

8. I deny the allegations in para 6 of the affidavit that the petitioner has no other alternative remedy except to approach the Hon'ble High Court, Hyderabad under Article 226(c) of the Constitution of India. The petitioner can approach the Government as provided under Section 675 to 678 of the HMC Act.

9. It is for the petitioner or the owner of the layout to take necessary legal steps against the hut dwellers for eviction in park area and other open space and thereafter transfer and handover vacant possession of the same to the respondent. On fulfilment of all the conditions in the sanctioned layout only the petitioner can claim the liabilities and responsibilities mentioned in Section 112 of HMC Act, 1955.

10. In view of all the facts stated above, the petitioner is not entitled to any of the reliefs prayed for in para 7 of the affidavit and the petition".

13. It is also not in dispute that in the said counter affidavit, the Municipal Corporation of Hyderabad stated, in clear and vivid terms, about non-existence of layout as pleaded by the petitioners herein. It is also clear from a reading of the order dated 24.12.1979 passed in W.P.No.4663 of 1978 that a request was made to permit the petitioners to withdraw the writ petition

having regard to the averments made in paras 6 and 7 of the counter affidavit. It is also significant to note that though a categorical statement was made by Municipal Corporation with regard to non-existence of approved layout as pleaded by the Association, admittedly no efforts were made to get final layout approved. Copy of the proposed layout filed along with writ petition and plan attached to the sale deeds would not render any assistance to the petitioners in the absence of production of approved layout. It is also pertinent to note in this context that on the request made by the Tahsildar, GHMC vide Lr.No.A/3450/GHMC/TPS/HO/2017 dated 20.8.2018 informed that there is no file or record bearing T.A.No.66/60/MC/ Hyd/246/BPS/2/60 and GHMC also enclosed an extract of list of layouts and the same also does not contain any layout said to have been sanctioned in respect of the subject lands. In the absence of any evidence contra, the said document is required to be given credence and necessarily it has to be construed that there is no sanctioned layout for the subject land. In the absence of approved layout, the petitioners herein, in the considered opinion of this Court, cannot seek any relief on the basis of the contention that in the approved layout, the subject area is earmarked for park purpose.

14. Another contention advanced by the learned Advocate General is that in view of the declaration of the subject area as slum area by way of notifications under Section 3 of the Slum Improvement Act, the area stood vested in the Government in the year 1984 and at this length of time, the said notifications cannot be questioned. In fact, in *New Bhoiguda Mosque and Grave Yard Committee's case* (7 supra), this Court refused to entertain the writ petition after six years and in the instant case, it is more than three and half decades. The contention that the said notifications do not cover the subject land also falls to ground in view of the specific mention of the subject

land in the said notifications. Since the petitioners herein failed in establishing that in the approved layout, the subject area is earmarked as park, the judgements on which they are placing reliance would not render any assistance to the case of the petitioners. It is significant to note that there is no explanation offered by the petitioners as to why they maintained absolute silence in approaching judicial forum after the orders of this Court in W.P.No.4663 of 1978. In the considered opinion of this Court, the said unexplained silence is fatal to the case of the petitioners. Obviously, in order to take advantage of removal of structures of hut dwellers from the subject land, the present writ petition is filed. In view of the above findings, the other grounds raised by the petitioners pale into insignificance.

15. In view of the above reasons, this Court has no scintilla of hesitation to hold that the petitioners have failed in making out a case, warranting interference of this Court under Article 226 of the Constitution of India.

16. For the aforesaid reasons, the writ petition is dismissed. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date: 20.9.2018
DA



THE HON'BLE SRI JUSTICE A.V.SESHA SAI



20.9.2018

DA