

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

W.P.Nos.25203, 26292, 28764 and 30743 of 2018

COMMON ORDER:

Since all these writ petitions ultimately focus on the same cause of action, this Court deems it appropriate to dispose of these writ petitions by way of this common order.

2. According to the deponent of the affidavits filed in support of the writ petitions, she along with her two sons and a daughter succeeded to the property in S.No.51/1 bearing D.No.4-72-14 and its appurtenant property situated at Lawsons' Bay Colony, Visakhapatnam after the death of her husband, who died intestate on 24.11.2010; that after the Hudhud Toophan and the consequential disaster, which took away the constructions, petitioners got renovated the sheds and erected a tin shed with nuts and bolts for the business in red roast juice and food court and for residence and the said business is the only bread earning source for the petitioner's family; that the family members of the petitioner are running the said business after obtaining necessary permissions from the concerned authorities; that earlier when there was interference of the staff of the Respondent Corporation on 13.12.2016 and 15.12.2016 even after showing all the papers, petitioners instituted O.S.No.1588 of 2016 on the file of the Court of the Principal Senior Civil Judge, Visakhapatnam and in I.A.No.1163 of 2016 on 19.12.2016, the said Court granted interim injunction; that thereafter the Respondent Municipal Corporation filed I.A.No.13 of 2017 on 4.1.2017 to vacate the said order dated 19.12.2016. The Civil Court passed the following order dated 5.1.2017:

“Counter along with photographs filed by the respondents/plaintiffs. While hearing, the counsel for petitioners represented that the respondents/plaintiffs making constructions, which fact the respondents/plaintiffs denied. As the Civil Vacation is approaching, it needs time to dispose of the matter. Therefore, considering the circumstances of the case, the counsel for the respondents/plaintiffs submitted an undertaking given by all the respondents/plaintiffs to the effect that they undertook that they are not going to make permanent structures till the disposal of this application. Considering the undertaking submitted by respondents/plaintiffs and the fact that any constructions if at all undertaken by them may cause prejudice to the petitioner/defendant Corporation, I feel that it is a fit case to pass an interim order till the disposal of the suit directing the respondents/ plaintiffs subject to their undertaking not to go for any construction activity till the disposal of this application. For hearing posted to 25.1.2017”.

3. Thereafter, in I.A.No.19 of 2017, an Advocate Commissioner was appointed, who submitted a report. Vide U.C.No.04/2017/ACP-II dated 13.3.2017, the Zonal Commissioner, issued a notice under Section 452 of Hyderabad Municipal Corporation Act, asking the petitioner to submit explanation and on 22.3.2017 explanation was submitted and according to the petitioners the same was not considered and when the Corporation resorted to highhanded coercive action, petitioner filed W.P.No.10756 of 2017 and the said writ petition was disposed of directing to pass speaking orders after considering the explanation within four weeks and that instead of following the said order, the Commissioner issued a notice vide Rc.No.1719/2016/ACP-II dated 26.4.2017 under Section 636 of HMC Act. Thereafter, petitioner filed W.P.No.16784 of 2017 and this Court disposed of the same vide order dated 11.7.2017 and paragraphs 3 and 4 of the said order read as under:

“(3) learned counsel for the petitioners submitted that the petitioners made the aforesaid constructions after Hudhud cyclone with

the funds of the Collector that the petitioners will withdraw O.S.No.1588 of 2016 pending on the file of the Principal Senior Civil Judge 's Court at Visakhapatnam; that the petitioners may be permitted to produce all the relevant documents and make an application before the respondent authorities for regularisation of the aforesaid constructions and hence prays to direct the respondent authorities not to take any coercive steps against the petitioners.

(4) Considering the facts and circumstances of the case and the submissions of the learned counsel for the petitioners, without going into the merits of the case, this writ petition is disposed of with the following directions :-

'The respondents are hereby directed not to take any coercive steps against the petitioners basing on the speaking order dated 26.4.2017 passed by respondent No.2 provided the petitioners produce all the relevant documents and make an application for regularisation of the aforesaid constructions before the respondent authorities within a period of six (6) months from the date of receipt of a copy of this order and on filing of such an application the respondent authorities shall consider the same and pass appropriate orders in accordance with law. Failure to produce any relevant documents or make such application by the petitioners, the respondent corporation is at liberty to take appropriate action against the petitioners in accordance with law.' "

4. According to the petitioners, when an attempt was made to submit application for regularisation, the staff of the 2nd respondent Corporation refused to receive the said application on the ground that the subject property would fall in CRZ-3 and there is prohibition on constructions and having left with no alternative, petitioner submitted a representation to the 2nd respondent for a clarification as to whether the subject property falls in CRZ-3 or CRZ-2 zone. Vide endorsement dated 5.9.2017 in Rc.No.006791/2017/ACP-II, the Commissioner informed that the petitioner should approach Visakhapatnam Urban Development Authority (VUDA) for confirmation of CRZ zone. It is further stated that thereafter the petitioner

submitted an application dated 10.10.2017 before VUDA to clarify as to whether the subject property falls within CRZ-2 or CRZ-3, but the said authority did not furnish any information.

5. Petitioner filed W.P.No.12816 of 2018, and this Court on 24.4.2018 in I.A.No.1 of 2018, passed the following interim order:

“There shall be interim direction as prayed for till the 3rd respondent (VUDA) disposes of the petitioner’s request dated 10.10.2017)”

6. As against the said interlocutory order, The Respondent Corporation filed W.A.No.780 of 2018 and by way of order dated 8.6.2018, the Division Bench of this Court disposed of both W.A.No.780 of 2018 and W.P.No.12816 of 2018 and the operative portion of the said order reads as follows:

“While expressing his reservations to such an order being passed, Sri S.Lakshminarayana Reddy, Learned Standing Counsel for the GVMC, would submit that this is yet another effort on the part of the respondents-writ petitioners to needlessly drag on proceedings only with a view to avoid action being taken against them; and a speaking order was passed by the appellants on 26.04.2017 itself holding that the subject land falls within CRZ-III. While this submission of the learned Standing Counsel cannot be said to without merit, the fact remains that it is the Commissioner, GVMC who had, after having passed the order dated 26.04.2017, issued the endorsement dated 05.09.2017 directing the respondents-writ petitioners to approach VUDA for confirmation as to whether their land falls within CRZ-II or CRZ-III. Having issued the endorsement dated 05.09.2017, it is not now open to the Commissioner, GVMC to contend that the subject building should be demolished even without determining (i) whether or not the subject land falls within CRZ-II or CRZ-III; (ii) if it falls within CRZ-II, whether buildings, constructed prior to February, 1991, are exempt from the requirement of obtaining prior clearance from the coastal zonal management authorities; and (3) whether the respondents-writ petitioners had, in fact, raised these construction before February, 1991 as claimed by them.

As the very object of prescription of the Coastal Zonal Regulations is to prevent construction near the Coast, it is necessary that illegal and unauthorised constructions, if any, be removed in accordance with law. Since the respondents-writ petitioners seek an opportunity to put forth their submissions to the appellants, we consider it appropriate to give them an opportunity to do so within 10 days from today. By their representation, and the documents, if any, annexed thereto, the respondents-writ petitioners should clearly establish that the construction raised by them is before 19.02.1991 when the CRZ Regulations were notified in SO.114(E) dated 19.02.1991; and that the subject construction falls within CRZ-II (for, if it falls within CRZ-III, even according to the respondents-writ petitioners themselves, the construction made before 19.02.1991 also requires prior clearance). The respondents-writ petitioners shall also specify, in their representation, the relevant Regulation, in the 1991 CRZ Regulations, which exempts buildings constructed before 19.02.1991 from the requirement of obtaining clearance from the Coastal Zonal Management authority.

The GVMC shall, within 10 days from the date of receipt of the respondents-writ petitioners' representation, pass a reasoned order considering all the contentions raised in the representation, communicate the said order to the respondent-writ petitioner, and thereafter take action in accordance with law. Needless to state that, in case the respondents-writ petitioners are not able to show that they do not require prior clearance from the Coastal Zonal Management Authority, it is open to the GVMC to take action, against the construction raised by them, in accordance with law since, admittedly, no permission from the Coastal Zonal Management Authority has been obtained by the respondents-writ petitioners. It is made clear that, if the respondent-writ petitioner fails to submit their representation to the Commissioner, GVMC within ten days from today, it is open to the appellants to proceed and take action in accordance with law, without awaiting receipt of the respondent-writ petitioner's representation.

Both Sri G.Venkata Reddy, learned counsel for the respondents-writ petitioners, and Sri S.Lakshminarayana Reddy, learned Standing Counsel for the GVMC, agree that, in the light of the order now passed by this Court, the cause in the writ petition does not survive. Consequently, the order under appeal is set aside and both the Writ Appeal and the Writ Petition are disposed of in terms of the directions

issued hereinabove. Miscellaneous Petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.”

7. On 13.6.2018, petitioner submitted a representation to the Member Secretary, A.P. Coastal Zone Management Authority, Vijayawada and the said representation reads as under:

“I humbly submit that I am the legal title holder of the house and site located at T.S.No.51/1, D. No. 4-7244, Lawson's Bay Colony, Ward No 23, Zone-II, GVMC, Visakhapatnam. My family has been staying in the same house with my sons since 45 years. The house was damaged several times and was reconstructed by way of repairing the damaged segments. However, no new structures were added except maintenance of the existing structures by under taking timely repairs to structures and roof.

The officials of the GVMC (Greater Vishakhapatnam Municipal Corporation) are insisting for clearance/authorization from the A.P. Coastal Zone Management Authority for the structures located in CRZ area. Since this area is classified as CRZ-11 and my house is a single floor dwelling and resembles like a temporary structure. The house has been in existence since 1950s onwards and we are paying electricity and telephone bills.

As officials of GVMC are insisting for authorization for the structures existed since 1950, I request you sir, to clarify, whether, authorization/clearance is still required for the house or dwellings constructed prior to 19.02.1991. The CRZ notification 1991 stipulated that provisions are enforceable with effect from the date of issue of this notification only. i.e. w.e.f 19.02.1991.

I will be grateful to you sir that a clarification in this regard will be helpful to me to resolve the issue with the GVMC.”

8. On 14.6.2018, petitioner submitted a representation and thereafter the 2nd respondent passed a speaking order vide Rc.No.17719/2016/ACP-II dated 13.7.2018, informing that unauthorised construction will be demolished in one week of service of the said order.

9. According to the learned counsel for the petitioner, the impugned action which culminated in passing the questioned order dated 13.7.2018 is highly illegal, arbitrary, unreasonable, violative of Articles 14, 21 and 300-A of the Constitution of India, besides being opposed to the very spirit and object of the provisions of HMC Act, 1955 and the Rules framed thereunder. It is further contended that the 2nd respondent without considering any one of the contents of the representation issued the impugned order. It is also the submission of the learned counsel that the petitioner submitted a representation to the 5th respondent on 13.6.2018 to furnish the information, but no information which is crucial has been furnished so far. It is further maintained that the Respondent Corporation authorities completely ignored the reality that the calamity of Hudud had completely taken away the structures in the subject land and the restoration of the structures affected in the Hudud are sought to be treated as fresh structures. It is also submitted that the petitioners on 21.7.2018 applied for building permission and that the power of demolition under Sections 452 and 636 is not mandatory and that the constructions in the subject premises are strictly as per law and that the very basis for the impugned action is the notice dated 30.3.2017 issued under Section 452 of HMC Act and that the Respondent Corporation ought to have seen that vide order in W.P.No.16784 of 2017, the entire process came to an end and directly the Respondent Corporation should not have issued the impugned notice without being preceded once again by the show cause afresh under Section 452 of HMC Act, 1955 and that as per Rule 3(10)(a)(iii) AND Rule 9 of A.P. Building Rules, 2017, building permission for reconstruction of the structures damaged by storm etc., is not required. In support of his submissions and contentions, Sri P.V.A.Padmanabham, learned counsel for the petitioners placed reliance on the following judgments.

- (1) Municipal Corporation of Hyderabad, rep. by its Special Officer, Hyderabad v. Shamsuddin Hasan Khudankmai and another¹.
- (2) 3 ACES, Hyderabad v. Municipal Corporation of Hyderabad².
- (3) B.Uma Devi v. Greater Hyderabad Municipal Corporation, Hyderabad and another³
- (4) V.M.Kurian v. State of Kerala and others⁴

10. Per contra, it is vehemently contended by Sri S.Lakshminarayana Reddy, learned Standing Counsel for the Respondent Corporation that there is no illegality nor there exists any infirmity in the impugned action and in the absence of the same, the impugned action is not amenable for any judicial review under Article 226 of the Constitution of India; that the present writ petition is a deliberate attempt to drag on the issue to a possible length of time; that as the impugned order is supported by valid and convincing reasons, no interference of this Court under Article 226 of the Constitution of India is warranted; that even for alteration, permission is required under Section 428 of HMC Act; that the petitioners did not make any application under Section 455-A for regularisation; that no documents were filed to show that the structures were existing even prior to 1991. The learned Standing Counsel takes the support of the following judgments:

- (1) Micro Hotel P. Ltd. v. Hotel Torrento Limited and others⁵
- (2) Municipal Corporation of Hyderabad rep. by its Commissioner v. Philomena Education Foundation of India rep. by its Sole Trustee⁶
- (3) V. Narasimham S/o V. Jagannadha Rao and V. Jagannadha Rao S/o Late Ramalingam v. Greater Hyderabad Municipal

¹ (1978) 1 APLJ 459

² (1994) 2 APLJ 194 (FB)

³ (2007) 6 ALD 356

⁴ (2001) 4 SCC 215

⁵ (2012) 10 SCC 290

⁶ 2008(1) ALT 670 (DB)

Corporation rep. by its Commissioner and The Town Planning Officer, Greater Hyderabad Municipal Corporation⁷.

- (4) R. Srinivas Kumar and Others v. The Greater Hyderabad Municipal Corporation and Others⁸
- (5) Muni Suvrat-Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad and others⁹
- (6) Ganapathi National Middle School v. M. Durai Kannan (Dead) by Lrs. and others¹⁰
- (7) 3 Aces, Hyderabad v. Municipal Corporation of Hyderabad¹¹

11. A perusal of the representation dated 12.6.2018 (received by the 2nd respondent on 14.6.2018) shows that the petitioner stated therein that CRZ Notification, 1991 issued by the Ministry of Environment and Forests, Government of India did not provide for issuance of clearance or authorisation for the houses/dwellings constructed prior to issuance of CRZ Notification, 1991 dated 19.2.1991 and enclosed the said CRZ Notification with the said representation. The petitioner herein also brought to the notice of 2nd respondent that she will obtain necessary clarification from the A.P. Coastal Zone Management Authority and it is not in dispute that the petitioner submitted such application to the said Authority on 13.6.2018 and as per the petitioner, no such information has been received so far from the said authority.

12. A perusal of the impugned order discloses in vivid and clear terms that except referring to the contents of the representation of the petitioner dated 14.6.2018, the 2nd respondent-Commissioner refused to consider the same without assigning any proper reasons for discarding the same. It is also required to be noted that though the petitioner said that clarification has

⁷ 2007(5) ALD 203

⁸ 2013(4) ALD 161

⁹ (2006) 8 SCC 590

¹⁰ (1996) 6 SCC 464

¹¹ AIR 1995 AP 17

been sought from A.P. Coastal Regulatory Zone Authority and will be submitted, the 2nd respondent did not grant any time and passed the impugned order. The 2nd respondent ought to have granted time to the petitioner to produce the clarification from the authority as the substantial rights in the property are involved in the case on hand.

13. It is also significant to note in this context that the State Government in exercise of the powers conferred under Section 585 read with 592 of HMC Act, framed the rules called 'The Andhra Pradesh Building Rules, 2017' and Rule 3(10)(a)(iii) of the said rules read as follows::

“Building Permission not required.

No Application and building permission is necessary for the following alterations, which do not otherwise violate any provisions regarding general building requirements, structural stability and fire safety requirements of these Rules.

- (1) Plastering and patch repairs.
- (2) Flooring and re-flooring.
- (3) Construction or re-construction of sunshade not more than in width within one's land and not overhanging over a public street.
- (4) Construction or re-construction of parapet not more than 1.5m. in height as permissible under these Rules.
- (5) White-washing, painting etc., including erection of false ceiling in any floor at the permissible clear height provided the false ceiling in no way can be put to use as a loft etc.
- (6) Erection or re-erection of internal partitions provided the same are within the purview of the Rules.
- (7) Opening and Closing of windows, ventilators and doors not opening towards other's properties and or public road/property.
- (8) Replacing fallen bricks, stones, pillars, beams etc.
- (9) Reconstruction of portions of buildings damaged by storm, rains, fire, earthquake or any other natural calamity to the same extent and specifications as existed prior to the damage provided the use conforms to the provisions of the Master Plan/any other sanctioned plan.”

14. The factum of Hudhud, a storm, hitting Visakhapatnam Coast is not in controversy. It is very much evident from a reading of the said Rule that for reconstruction of structures which suffered damage due to storms, no building permission is required. In this context it may be appropriate to refer to the judgments cited by the learned counsel for the petitioner.

(1) In *Municipal Corporation of Hyderabad, rep. by its Special Officer, Hyderabad v. Shamsuddin Hasan Khudankmai* (1 supra), this Court at paragraph 9 held as under:

“Next we may refer to the decision in *Bishambar Sahai v. Delhi Municipality* (2) A.I.R. 1940 Lahore ??? In that case, a building was erected without obtaining the sanction of the Municipal Committee, Delhi. Thereupon a notice was given under Section 195 of the Punjab Municipal Act requiring him to demolish a portion of that building. That person filed a suit for an injunction restraining the Committee from demolishing any part of his house. The suit was dismissed; so also the appeal. Thereupon, he filed a second appeal in the High Court of Lahore. While deciding the question whether demolition should have been ordered, Din Muhammad J. observed:

‘It is true that power is vested in the committee to require the demolition of a building which is erected without the necessary sanction, but this power is vested in the committee to meet extreme cases of defiance or cases in which encroachments are made on municipal lands or rules framed by the committee on hygienic or sanitary grounds are flagrantly ignored. Where however this is not the case and the only infringement of the law is disregard of the provision requiring every person not to erect any building without the sanction of the Committee, the law provides an alternative remedy and that is to penalize the offender in such sum as the committee may deem reasonable. In the present case, it is admitted that no encroachment has been made on the municipal land. It is further not disputed that no rules of hygiene or sanitation have been broken. It was also admitted by the respondent's counsel that a part at least of the third storey had not been newly built. In these circumstances, I am of the opinion that the committee should not have used its extreme powers and consequently it should have been restrained from demolishing the building objected to.’ ”

(2) In *3 ACES, Hyderabad v. Municipal Corporation of Hyderabad* (2 supra), this Court at paragraphs 13(4) and 27 held as under:

“13(4) The power of demolition reserved to the respondent under Section 452 of “The Act” is not a mandatory one. It cannot be resorted to unless there is overwhelming public interest involved.

27. Point No. 4: This point relates to the power to demolition under S. 452 of “The Act”. The contention of the petitioner is that the demolition contemplated under Sec. 452 of “The Act” is not a mandatory one. The power of demolition should not be resorted to unless overwhelming public interest is involved. We have already referred to the Judgment of the Supreme Court in *Prathiba Co-operative Housing Society's case* (AIR 1991 SC 1453) (supra) wherein it was clearly mentioned by the Supreme Court that the rules, regulations and bye-laws are made taking in view the larger public interest of the society. To appreciate this contention, it is necessary to refer to the observations of the learned Judges of the Supreme Court in the Judgment referred to supra (AIR 1991 SC 1453) which are as follows: (at p. 1456 of AIR).

“We are also of the view that the tendency of raising unlawful constructions and unauthorised encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands. Such unlawful constructions are against public interest and hazardous to the safety of occupiers and residents of multistoried buildings.”

(Emphasis supplied)

The learned Judges further made the following pertinent observations (AIR 1991 SC 1453 at p 1456):

“Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large.”

(3) In *B.Uma Devi v. Greater Hyderabad Municipal Corporation, Hyderabad* (3 supra), this Court at paragraph 6 held as under:

“The petitioner relies on a judgment of a Full Bench of this Court in *3 Aces v. Municipal Corporation of Hyderabad*, 1995 (1) ALD 1 (FB) : AIR 1995 AP 17. A number of issues under the provisions of the Act fell for the consideration of the Full Bench in that case, including as to the entitlement of a person to construct in the factual context of a deemed permission consequent on the silence of the Municipal

Corporation in responding to an application for building permission within the stipulated time. This Court pointed out in the judgment that a deemed permission is not a licence to vagrant and malignant construction. Deemed permission would enable construction in accordance with the extant building regulations, pointed out this Court.”

(4) In *V.M.Kurian v. State of Kerala* (4 supra), the Hon’ble Supreme Court at paragraph 11 held as under:

“Under the Rules, there is restriction with regard to the maximum height of the building. The building should not be constructed exceeding 1.5 times the width of the street abutting plus 1.5 times the front yard. Before the High Court, the 5th respondent gave an affidavit that he would convert the ground floor of the building for purposes of car parking. The said affidavit could not have been entertained as the ground floor had already been constructed and let out. Most surprising is that the requirement of having provision towards protection from fire hazards was also dispensed with. The minimum width of the staircase as required under Rule 21(11)(b) also got dispensed with. This shows that the Rules which are mandatory in nature and are required to be complied with for construction of a high-rise building, were allowed to be dispensed with. Observance and compliance with the Rules is for public safety and convenience. There cannot be relaxation of the Rules which are mandatory in nature and cannot be dispensed with especially in the case of a high-rise building. The position may be different in the case of one or two-storeyed building where there are minor deviations from the Rules, which do not affect the public safety and convenience. In the present case, we find that the deviations are of high magnitude, which are contrary to public safety and convenience. We are, therefore, of the view that the order passed by the State Government exempting the provisions of the Rules for constructing an eight-storeyed building was contrary to the mandatory provisions of the Rules and therefore, is not sustainable in law.”

15. It is very much evident from the above authoritative pronouncements that power to demolish conferred on the Commissioner is required to be exercised in appropriate cases where the rights of the third parties are

affected and in public interest and not in a routine manner. In the instant case, no such exercise is undertaken by the Commissioner in order to arrive at the impugned conclusion. Even according to the Respondent authorities, the said area falls under CRZ-2 and not CRZ-3.

16. Having regard to the above factual and legal situation, this Court deems it appropriate to grant time to the petitioner to file information sought from the Respondent authorities as to the classification and it is also open for the petitioner herein to file appropriate application under Section 455-A of HMC Act, 1955.

17. For the aforesaid reasons, all the writ petitions are allowed, setting aside the impugned order dated 13.7.2018 in W.P.No.25203 of 2018 and the petitioner is granted two months time to submit representation afresh enclosing the information from the competent authority and also application under Section 455-A of HMC Act as permitted in W.P.No.16784 of 2017 and thereafter it is open for the Respondent Corporation to pass orders after hearing the petitioner duly taking into account the observations made supra. Till then, Status quo ante prior to the impugned order shall be maintained and the locks shall be reopened and it is further made clear that no further construction shall be undertaken by the petitioners in the subject premises. 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: 2.11.2018
DA

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



W.P.Nos.25203, 26292, 28764 and 30743 of 2018

2.11.2018