

THE HON' BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION No.35251 of 2017

ORDER:

Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioners seek a Writ of Mandamus by declaring the action of the respondent authorities in making construction of an Overhead Water Tank in the area earmarked for Park in Sri Sai Enclave, Baswa Gardens, Vinayak Nagar, Nizamabad, falling under Layout L.P.No.74/1996 dated 31.01.1997, as illegal and violative of Articles 14, 21 and 300-A of the Constitution of India, and consequently direct them to stop the construction of Overhead Water Tank in the said area.

The pleaded case of the petitioners, as per the averments in the writ affidavit is as under:

The petitioners are residents of Sri Sai Enclave, Baswa Gardens, Vinayak Nagar, Nizamabad. Petitioners 1 and 2 are the owners of house property bearing Municipal No.1-13-404/9 constructed in Plot No.19; and petitioners 3 and 4 are the owners of house property bearing Municipal No.1-13-404/9A constructed in Plot No.20. Petitioner No.5 is the owner of Flat No.401, Vaishnavi Apartments, Baswa Gardens, Nizamabad. The residential layout was sanctioned vide LP No.74/1996 by the 3rd respondent, and opposite to the house of the petitioners, the area was earmarked to establish a Park as per the sanctioned layout plan. While so, the 3rd respondent has sanctioned funds under the "Amrut Scheme", which is funded by the Central and State Governments, for construction of an Overhead Water Tank in the earmarked area for Park. The Water Tank is proposed for the use of the residents of not only Sri Sai Enclave but also about 10 to 12 colonies in the vicinity. It is alleged that the said construction, if permitted, would devour

the entire Park area depriving the residents of essential lung space and greenery. Alleging that such a construction would violate the sanctioned plan, the petitioners filed this writ petition to reign in the respondents from proceeding with the construction of Overhead Water Tank.

Counter affidavit is filed by the 3rd respondent-Commissioner, Nizamabad Municipal Corporation. An additional counter affidavit is also filed pursuant to the order passed by this Court on 03.11.2017 directing to furnish information with regard to the number of layouts in the vicinity, the sizes/areas of parks in such layouts and the total area of the park in which the proposed Water Tank is contemplated for construction. On 13.02.2019, while hearing the submissions being made by the counsel, this Court queried with respect to the exact area the pillars of the proposed Overhead Water Tank would occupy once constructed, and directed the Municipal official/Engineer overseeing the work to file an affidavit. In compliance of the said direction, another additional affidavit is filed.

Heard Sri T.V. Kalyan Singh, learned counsel appearing for the writ petitioners; and Sri V. Satyam Reddy, learned Government Pleader for Municipal Administration appearing on behalf of the respondent Municipal Corporation.

Learned counsel for the petitioners submits that the respondent-Municipal Corporation is proposing to construct the Water Tank in the area earmarked for Park, as per the sanctioned layout, with the alleged objective of catering to drinking water needs of residents of about 10 to 12 colonies besides Sri Sai Enclave. Learned counsel submits that no conversion of usage is permissible either as per the sanctioned layout plan or under law. Learned counsel relied on the judgment of the Hon' ble Supreme Court in

Bangalore Medical Trust v. B.S.Muddappa¹; Pt. Chet Ram Vashist (dead) by L.Rs. v. Municipal Corporation of Delhi²; Dr.G.N.Khajuria v. Delhi Development Authority³; Machavarapu Srinivasa Rao v. Vijayawada, Guntur, Tenali, Mangalagiri Urban Development Authority⁴.

Drawing attention of the Court to paragraph 20 in Machavarapu (4 supra), the learned counsel contends that once the plan is sanctioned by the State Government, no one including the State Government/Development Authority can use land for any purpose other than the one specified therein; and therefore the action of respondents herein in proposing to convert the area of Park into a site of Water Tank is impermissible and the Park area cannot be used for any other purpose.

On the other hand, learned Government Pleader, by drawing attention to the specific averments in the counter affidavit and also the additional counter affidavits filed in compliance of the directions of this Court, submits that in the same vicinity there are three layouts viz., L.P.No.74/1996 (consisting of four open spaces spread in 1050 sq.yds, 494.18 sq.yds, 1736.75 sq.yds and 3592.22 sq.yds), L.P.No.23/1997 (with an open space of 1645.60 sq.yds) and L.P.No.529/84 (with an open space of 4743.20 sq.yds). It is also submitted that abutting the layout in L.P.No.74/1996, an open space of 1456 Sq.yards was approved in another layout in L.P.No.576/83; and that there are some other parks at a distance of 200 meters and 500 meters that are being used by people for recreation, walking etc.

¹ AIR 1991 SC 1902

² AIR 1995 SC 430

³ AIR 1996 SC 253

⁴ (2011) 12 SCC 154

Learned Government Pleader further submits that the capacity of the proposed Water Tank is about 1600 Kilolitres and the Tank is designed to cater to the drinking water needs of a population of about 4,79,976 of prospective year 2033, and about 6,45,984 by the year 2048, with a *per capita* water supply at the rate of 150 LPCD (liters per capita per day). It is further submitted that the proposed Water Tank would be 23.60 meters in diameter, and the Tank would stand at an elevated level of about 40 feet above the ground, and hence there would be space beneath the Water Tank that can be utilized for development of greenery.

Learned Government Pleader further submits that the pillars would occupy only about 10 Square Yards (9.37 sq.yards to be precise) out of the Park area of 1736.75 Square Yards and therefore the allegation of the petitioners that they would be deprived of the entire Park area if the construction of Water Tank is permitted is false. Learned counsel further submits that though the petitioners assert that the open area in question is a Park and is being utilized as a Park, however, as a matter of fact, the petitioners are using the area for parking their vehicles.

Learned Government Pleader, by specifically drawing attention to the Gift (Settlement) Deed dated 16.01.1997 executed by Kanuganti Estates in favour of the Municipal Commissioner, submits that by virtue of the Gift (Settlement) Deed the respondent Municipality has the authority to utilize the land for public purpose. He further submits that the area is witnessing rapid development with multistoried constructions coming up, and there being shortage of drinking water for the residents of the region, keeping in view the larger public interest of catering to drinking water needs of the present as well as future residents of the region, the Government has sanctioned funds for construction of Water Tank.

Learned Government Pleader relying on the judgment of Kamal Nagar Welfare Association v. Government of Andhra Pradesh⁵, contends that merely because few individuals are affected, the larger public interest cannot be ignored. He also relied on the judgment of the Allahabad High Court in Shyam Manohar Srivastava v. State of U.P., through Principal Secretary, Nagariya Vikash, Government of U.P., Lucknow⁶, and contends that in a similar case, the Allahabad High Court has approved the construction of a Water Tank in an area earmarked for Park. He also relied on the judgment of the Hon' ble Supreme Court in T.N.Godavarman Thirumalpad (through K.M.Chinnappa) v. Union of India⁷, wherein it was held in paragraph 35 as under:

“35. It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship.”

Having regard to the respective submissions, the short question that falls for consideration in the present writ petition is whether the action of the respondent Municipal Corporation in utilizing the open space gifted to the Corporation by the propounder of the layout, for the purpose of construction of Water Tank, is bad and liable to be interfered with.

A perusal of the Gift (Settlement) Deed dated 16.01.1997 executed by Kanuganti Estates in favour of the Municipal Commissioner, through which

⁵ AIR 2000 Andhra Pradesh 132

⁶ 2010 SCC OnLine All 462

⁷ (2002) 10 SCC 606

the Municipal Corporation came to have acquired right and title over the open space over an extent of 1451.56 Square meters, does not disclose the same as having been earmarked specifically for Park. In fact, the Donor has left the existing open space for use of public at large. To quote the verbatim, paragraph No.3 of the said Gift (Settlement) Deed reads as under:

“3. As per the layout the Donor left the existing Open space for the use of the public at large for charitable purpose.”

Thus, the proposed utilization of open space is for construction of a Water Tank thereby to cater to the drinking water needs of not only the residents of Sri Sai Enclave but also the surrounding areas of the region and public at large.

The judgments relied upon by the learned counsel for the petitioners do not come to the aid of the petitioners, as a careful reading of the judgments would disclose that the Supreme Court in Bangalore Medical Trust (1 supra) case observed that the land earmarked for Park was sought to be utilized for construction of a private Nursing Home, and further in the light of the specific statutory provisions under the Bangalore Development Authority Act, 1976, such proposed conversion was held to be bad; and in the facts of the said case, there were proven *mala fides*, but in the present case no *mala fides* were alleged.

In Pt. Chet Ram Vashist (2 supra), the issue which fell for consideration is, in the absence of any provision in the Delhi Municipal Corporation Act, 1957, for sanction of Building Construction in the open space for Parks and Schools, whether the Municipal Corporation of Delhi was entitled to claim that the land so specified should be transferred to the

authority free of cost. Answering the said issue in the negative, the Supreme Court held in para 6 as under:

“Reserving any site for any street, open space, park, school etc. in a lay-out plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the colonizer in the sanctioned layout plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred in the person in whose favour it is transferred. The resolution of the Committee to transfer land in the colony for parks and school was an order for transfer without there being any sanction for the same in law.”

The above extracted paragraph makes it clear that in the scheme of the Act which was under consideration before the Supreme Court, it was held that the Corporation could not have insisted on transferring the right over the property on behalf of the Corporation itself. However, it may be noted that the Supreme Court had held that the Corporation became custodian of the property and thus entitled to utilize the same for specified purpose in public interest, thus there being no embargo on the utilization of the property for public purpose.

In the present case, there is yet another distinction. The property, as a matter of fact, came to be gifted in favour of the Municipal Corporation,

thus, the Corporation has acquired absolute right and title over the property for utilizing the same for public purpose. Thus the judgment relied upon by the learned counsel for the petitioners, has no application to the facts of the present case.

Likewise, in Dr.G.N. Khajuria (3 supra), the Supreme held that the action of the Delhi Development Authority in permitting construction of a School in an area earmarked for Park i.e, Park No.6 of Packet 'A' of Sarita Vihar, was illegal.

Similarly in Machavarapu (4 supra), the Supreme Court was considering the legality of the action of respondent No.1 therein in permitting respondent No.3 to construct a temple on the land specifically earmarked for Park. The said judgments are not applicable to the facts of the present case as the open space in the present case was not specifically earmarked for establishing a Park, instead the open space has been gifted to the Municipal Corporation for using it in larger public interest and therefore one cannot lay a claim that the open space has been specifically earmarked for park.

On the other hand, the judgment of the Division Bench of Allahabad High Court in Shyam Manohar Srivastava (5 supra) supports the case of the respondent Corporation.

The specific assertion in the counter affidavit with respect to the need and also the utility of the Water Tank has not been denied by the petitioners, apart from the fact of existence of other open spaces in the layouts within the vicinity, which can be used by the residents of the locality.

In the light of the factual background, one cannot say that construction of a Water Tank in any way impairs the quality of life of the individuals living in the locality, and the comparative likelihood of hardship

which the petitioners and others are likely to face is offset by the larger public interest of providing drinking water which would enure to the benefit of not only the present residents but also the future residents of about 6,45,984 people in another three decades as the region is rapidly developing.

In those circumstances, this Court has no hesitation to hold that there is no arbitrariness in the action of respondent Municipal Corporation, and as there being no prohibition to utilize the open area in a way to benefit the public at large, even by virtue of the Gift (Settlement) Deed dated 16.01.1997 made in favour of the respondent Corporation by the propounder of the layout, the action of the respondents in utilizing the open space for construction of a Water Tank cannot be found fault with.

In the light of the above discussion, the Writ Petition is devoid of merit and is liable to be dismissed.

Accordingly, the writ petition is dismissed. No costs. The interim order dated 03.11.2017 passed in W.P.M.P.No.43783 of 2017 stands vacated. Miscellaneous petitions, if any pending, shall also stand dismissed.

JUSTICE CHALLA KODANDA RAM

25th March, 2019

Note: Issue C.C. in two days
B/o KSM

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KSM