
(2021) 10 TEL CK 0040

In the Telangana High Court

Case No : Writ Petition Nos. 11587 Of 2015 And 1048 Of 2021

M/S. Vaishnavi Constructions,

APPELLANT

Vs

The State Of Telangana

RESPONDENT

Date of Decision : 25-10-2021

Acts Referred:

A.P. Municipalities Act, 1965 — Section 217, 228, 228(1), 28(2), 228(3)

Citation : (2021) 10 TEL CK 0040

Hon'ble Judges : K. Lakshman, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

W.P.No.11587 OF 2015

1. This Writ Petition is filed by the Builder and Owner to declare the Confirmation Order (Notice), issued under Section 228(3) and 217 of the A.P. Municipalities Act, 1965 (for short, 'the Act') by the Respondents in Proceeding No.C.O.No.32/TPBO/TPS/A2/2012, dated 21.02.2015 as illegal and to set aside the same.

W.P.No.1048 OF 2021

This Writ Petition is filed by one of the Shop Owners of M/s. Vaishnavi Constructions (for short, 'the subject complex') to declare the action of the 2nd Respondent in not taking any steps on the representation dated 05.01.2021 submitted by him complaining that the Respondent Nos.3 to 6 were constructing a compound wall illegally opposite to his shop.

2. Heard Sri D.Bhaskar Reddy, learned Counsel for the Petitioner and Sri N.Praveen Kumar, learned Standing Counsel appearing for the Respondent Nos.2 and 3 in W.P.No.11587 of 2015; Sri M.Atish, learned Counsel for the Petitioner, Sri N.Praveen Kumar, learned Standing Counsel appearing for 2nd Respondent and Sri V.Raghunath, learned Counsel appearing for unofficial Respondent Nos.3 to 6 in W.P.No.1048 of 2021 and perused the record.

3. FACTS OF THE CASE

- i) The subject complex, and Sri G.Ashwin Reddy, the Petitioners in W.P.No.11587 of 2015 have applied to grant permission for construction of stilt, ground+ 4 upper floors residential apartment in Sy.No.412, situated at Mahalaxmi Colony, Armoor, Nizamabad District before the 2nd Respondent, who in turn, sent the proposal to the Director, Town and Country Planning, Hyderabad (for short, 'The DTCP').
- ii) The DTCP, Hyderabad, had accorded technical approval vide its letter Dis.No.10140/2010/H, dated 27.12.2010 and accordingly the 2nd Respondent had released the sanctioned plan vide proceedings No.A2/39/2010, dated 03.02.2011 on certain conditions.
- iii) According to the petitioners, they have constructed a building strictly in accordance with the sanctioned plan without any deviation or contrary to the procedure laid down under the Rules and Regulations.
- iv) They have completed the construction and handed over the possession to the prospective purchasers who have occupied their flats and residing in the subject complex.
- v) The 2nd Respondent had issued a notice, dated 18.09.2014 stating that the Petitioners have constructed the shops in stilt portion unauthorizedly meant for vehicular parking in the apartment against the sanctioned plan and thus directed them to remove the shops within ten days from the date of receipt of the said notice.
- vi) The 2nd Respondent again issued Confirmation Orders (Notice) under Section 228(3) and 217 of the Act, dated 21.02.2015, by registered post which was received by the Petitioners on 23.03.2015. In the said notice, the 2nd Respondent has referred earlier notice dated 18.09.2014 as provisional order to it which are contrary to the procedure laid down under Section 228 of the Act. The 2nd Respondent without issuing any provisional notice under Section 228(1) and (2) of the Act straightaway issued notice under Section 228(3) of the Act which is in violation of Section 228 of the Act and also in violation of the principles of natural justice.
- vii) With the said submissions, the Petitioners sought to set aside the impugned proceedings, dated 21.02.2015.

4. CONTENTIONS OF THE RESPONDENT NOS.2 AND 3.

- i) The Petitioners have applied for building permission for construction of residential apartment of stilt which is only meant for parking, ground + 4 upper floors in Sy.No.412 situated at Mahalaxmi Colony, Armoor, Nizamabad District.
- ii) The DTCP had issued technical approval for the said proposals on certain conditions and permit vide proceedings dated 27.12.2010 for which the Petitioners have given an undertaking through notarized affidavit stating that stilt

floor is provided for parking vehicles and it should not be converted or misused for any other purpose other than the parking of vehicles.

iii) The petitioners have gifted an area of 7ft. x 175 ft. = 136.11 sq.yards for the purpose of road widening from existing 32ft. to 40ft. road at northern side while approving of building plan by the DTCP, in favour of the 2nd Respondent for public charitable purpose, vide proceedings No.238/2011, dated 21.01.2011 but it is not left and constructed compound wall without leaving the land as per document executed by the Petitioners.

iv) The Petitioners have constructed shops at eastern side of the apartment in stilt area for which the flat owners of the subject complex have given an objection petition to the Chairperson and Commissioner Municipal Council, Armoor on 20.01.2015 and on 20.04.2003 to the District Collector, Nizamabad during the Prajavani programme.

iii) The Petitioners have mortgaged 10% of built-up area i.e. five flats of 402.50sq.meters in the 2nd floor for which they have submitted notarized affidavit on 28.01.2010 while getting building permission plans from the 2nd Respondent. They have sold away the said flats against the sanctioned plan and conditions.

iv) The Petitioners have constructed the residential apartment with maximum deviations against the sanctioned plan besides they have constructed the shops illegally in the stilt floor meant for exclusively vehicular parking as per the plan.

v) On the complaint given by the flat owners, the 2nd Respondent had issued provisional notice dated 18.09.2014 instructing the Petitioners to remove the shops which are constructed illegally in the stilt floor which is meant for parking. The petitioners have not removed the said shops. Therefore, the Confirmation Order, dated 21.02.2015 was issued to the petitioners. Therefore, there is no irregularity or illegality in issuing the same.

vi) The petitioners have not received said notice. Therefore, the 2nd Respondent had affixed said notice on the shop shutters constructed illegally stating that the shops constructed in parking space as such not to buy or sell the shops by any one.

vii) With the said contentions, the RespondentNos.2 and 3 sought to vacate the stay order dated 21.04.2015 passed in W.P.No.11587 of 2015 and also to dismiss the Writ Petition.

5. FACTS OF THE CASE IN W.P.No.1048 OF 2021

i) The Petitioner is one of the shop owners of the Vaishnavi Towers.

ii) He has purchased the Shop No.1 on stilt floor of Vaishnavi Towers admeasuring 216 sq.feet, including share in common areas, parking common facilities, corridor, balcony, common stair case, stilt etc., with an undivided share of land i.e. 35sq.yards under a registered sale deed doc.No.4797 of 2013, dated

11.12.2013.

iii) Before purchase, he had made enquires with all the flat owners and on assurance by them, he had purchased the subject Shop by paying sale consideration to the Vaishnavi Towers.

iv) On 05.01.2021, Respondent Nos.3 to 6 along with other flat owners of Vaishnavi Towers came to his shop and dumped construction material in front of his shop, when questioned, they replied that they are constructing a compound wall opposite to his shop. He has requested them not to construct a compound wall and tried to stop the same. Therefore, he along with other shop owners approached the 2nd Respondent by way of submitting a representation on 05.01.2021.

v) Despite receiving and acknowledging the said representation, the 2nd Respondent did not act upon it.

vi) The Respondent Nos.3 to 6 along with other flat owners of Vaishnavi Towers constructed compound wall on 08.01.2021 illegally without permission from the concerned Municipal authorities to occupy the shutter illegally and highhandedly. Therefore, he has filed the present Writ Petition.

CONTENTIONS OF THE 2ND RESPONDENT

6. The 2nd respondent has filed counter almost in the very same lines of the counter filed in W.P.No.11587 of 2015.

7. CONTENTIONS OF THE RESPONDENT NOS. 3 TO 6

i) The Builder has constructed a shop in deviation of the sanctioned plan approved by the DTCP and also contrary to the undertaking given by him.

ii) The Petitioner has approached subject complex with an intention to purchase and is aware that stilt area is meant for parking. No owner of the apartment has given permission for construction of the alleged shop.

The petitioner is very well aware of the said fact.

iii) The construction of compound wall has already taken place and now the Petitioner claims that construction material is being dumped in front of his shop without any substantial material which is virtually incorrect.

iv) The Petitioner, having purchased the shop which was constructed in violation of the approved plan, cannot claim any equity or right.

v) With the said submissions, the Respondent Nos.3 to 6 sought to dismiss the present Writ Petition.

CONSIDERATION OF THE COURT

8. In view of the specific contentions raised by the Builders in W.P.No.11587 of 2015 that the impugned proceedings, dated 21.02.2015 is contrary to the

procedure laid down under Section 228 of the Act, it is apt to refer Section 228 of the Act, the same is extracted below:-

"Section 228: Demolition or alteration of building work unlawfully commenced, carried on or completed.

(1) If the Commissioner is satisfied--

(i) that the construction or reconstruction of any building or well--

(a) has been commenced without obtaining the permission of the Commissioner or the Chairperson as the case may be, or where an appeal has been made to the council, in contravention of any order passed by the council; or

(b) is being carried on, or has been completed, otherwise than in accordance with the plans or particulars on which such permission or order was based; or

(c) is being carried on, or has been completed, in breach of any of the provisions of this Act or of any rule or bye-law made under this Act or of any direction or requisition lawfully given or made under this Act or such rules or bye laws; or

(ii) that any alterations required by any notice issued under Section 217 have not been duly made; or

(iii) that any alteration of or addition to any building or any other work made or done for any purpose into or upon, any building, has been commenced or is being carried on or has been completed in breach of Section 227.

he may make a provisional order requiring the owner or the builder to demolish the work done or so much of it as in the opinion of the said officer, has been unlawfully executed or to make such alterations as may, in his opinion, be necessary to bring the work into conformity with the Act, bye-laws, rules direction or requisition as aforesaid, or with the plans and particulars on which such permission or order was based; and may also direct that until the said order is complied with, the owner or builder shall refrain from proceeding with the building or well.

(2) The said officer shall serve a copy of the provisional order made under subsection (1) on the owner of the building or well, together with a notice requiring him to show cause within a reasonable time to be named in such notice why the order should not be confirmed.

(3) If the owner fails to show cause to the satisfaction of the said officer, he may confirm the order with such modification as he thinks fit to make, and such order shall then be binding on the owner."

9. Thus, Section 228(1) of the Act mandates the Commissioner to make a provisional order, Section 228(2) of the Act, mandates the said Commissioner to serve a copy of the provisional order made under Sub Section 1 of Section 228 of the Act, on the owner of the building together with a notice requiring him to show cause within a reasonable time to be named in such notice why the order

should not be confirmed. Thereafter, the Commissioner has to pass a Confirmation Order as per Section 228(3) of the Act.

10. In *G.V.Narasimha Reddy Vs. Commissioner, Nirmal Municipality, Adilabad District* (2005) 2 ALD 363, the then High Court of Andhra Pradesh, had an occasion to deal with the powers of the Commissioner under Section 228 of the Act, and held that the order on the ground of construction made without permission, in deviation of plan and same being not in accordance with law, no material to show that there was actual service of provisional order on petitioners, impugned order was not in accordance with law. Therefore, exercise of discretion by the Commissioner of Municipality in taking decision to order demolition and such discretion has to be exercised on just and reasonable grounds and not in arbitrary and capricious manner. In the said judgment, paragraph Nos.19 and 20 are important and they are reproduced herein:-

19. The words, "he may make a provisional order requiring the owner or the builder to demolish the work done or so much of it as in the opinion of the said officer, has been unlawfully executed or to make such alterations as may, in his opinion, be necessary to bring the work into conformity with the Act, Bye-laws, Rules, Direction or Requisition as aforesaid, or with the plans and particulars on which such permission or order was based; and may also direct that until the said order is complied with, the owner or builder shall refrain from proceeding with the building or well" are noteworthy.

20. The words "the said officer shall serve a copy of the provisional order made under Sub-section (1) on the owner of the building or well" and also the words "notice requiring him to show cause within a reasonable time to be named in such notice" and the words "if the owner fails to show cause to the satisfaction of the said officer, he may confirm the order with such modification as he thinks fit" in Sub-sections (2) and (3) assume lot of importance while dealing with the powers of the Commissioner and the mode and the method of the exercise of the said powers and the discretion to be exercised in relation thereto and under what circumstances while exercising such powers under Section 228 of the Act.

It was further held that the Commissioner of the Municipalities, has to exercise discretion in taking a decision in relation to order demolition. The said exercise is not arbitrary or capricious but on just and reasonable grounds.

11. There is no dispute that the DTCP has granted permission to the Petitioners for construction of stilt, ground + 4 upper floors. Approval was granted by the 2nd Respondent-Municipality vide proceedings dated 03.02.2011. The 2nd Respondent has issued notice, dated 18.09.2014 to the Petitioners herein stating that they have constructed shops unauthorizedly in the stilt floor exclusively meant for vehicle parking to the flat owners of Vaishnavi Residential Apartment. The said unauthorized shops were constructed in the said Apartment as against the sanctioned plan due to which the flat owners have faced lot of inconvenience for parking their vehicles. Therefore, the 2nd Respondent has directed the

Petitioners to remove all shops constructed unauthorizedly in stilt floor meant for parking exclusively, within ten days from the date of receipt of the notice, failing which the same will be removed through department and recover removal charges as incurred.

12. Vide Notice dated 21.02.2015, the 2nd Respondent has informed to the Petitioners in W.P.No.11587 of 2015 that the notice dated 18.09.2014 issued to the Petitioners to show cause why an order for removal of the shops cannot be passed and the same was duly served on the petitioners on 18.03.2015, and the petitioners failed to submit explanation. Therefore, the 2nd Respondent has issued the said Confirmation Orders/notice stating that the 2nd Respondent is making order directing the petitioners to remove by demolition or otherwise unauthorized construction (Development) within three days from the date of service of the Confirmation Order. Thus, the 2nd Respondent has not made any provisional order as mandated under Section 228(1) of the Act. The 2nd Respondent has not served any provisional order along with the show cause notice requesting the Petitioners to submit explanation. The said notice, dated 18.09.2014 cannot be treated as provisional order under Section 228(1) of the Act, and it is not accompanied by a show cause notice.

13. In the counter filed by the 2nd Respondent, there is no mention about the compliance of Section 228(1) and (2) of the Act. Therefore, the 2nd Respondent now cannot contend that the said notice dated 18.09.2014 is a provisional order under Section 228(1) and subsequent Confirmation Order dated 21.02.2015 is in accordance with Section 228(3) of the Act. Thus, According to this Court, the 2nd respondent has not complied with the procedure as mandatory provisions specified under Section 228(1) and (2) of the Act by way of making provisional order and serving a copy of the same along with show cause notice on the petitioners. Even, the Confirmation Order dated 21.02.2015 is silent with regard to making of provisional order as mandated under Section 228(1) of the Act and service of show cause notice under Section 228(2) of the Act. Therefore, the 2nd Respondent had issued Confirmation Order dated 21.02.2015 without complying with Section 228(1) and (2) of the Act and the same is violation of the procedure laid down under the Act.

14. The Petitioner in W.P.No.1048 of 2021, admittedly purchased a shop which was constructed by the Builder in violation of the sanctioned plan. The petitioner has not made enquiries including verification of documents, approval by DTCP released orders issued by the 2nd respondent Municipal Council. Without conducting due diligence and without verifying the documents properly, the Petitioner had purchased the shop No.1. He has made representation to the 2nd Respondent on 05.12.2021 complaining that the Respondent Nos.3 to 6, owners of the flats of the said complex have been making construction of compound wall illegally. Therefore, he has requested the 2nd respondent to take action in accordance with law.

15. In the counter filed by the Respondent Nos.3 to 6, it is categorically

mentioned that they have already completed construction of compound wall. There is no mention about the permission granted for construction of compound wall by the DTCP or the 2nd Respondent Municipal Council in the counter filed by the 2nd Respondent and also counter filed by the Respondent Nos.3 to 6. None of them have filed a copy of the approval granted by the DTCP to show that whether permission was granted for construction of compound wall. On perusal of the release of approvals issued by the Municipal Council, Armoor, dated 03.02.2011 would reveal that it is for construction of stilt, ground + 4 upper floors. Therefore, it is for the 2nd Respondent i.e. Municipal Council, Armoor, Nizamabad District which is to consider the said facts and also take action in accordance with law. However, the petitioner herein, having purchased the shop which is an unauthorized construction, cannot claim any right or equity. The photographs filed by the petitioner would reveal that the construction of compound wall is already over.

CONCLUSION:

16. In view of the above discussion, this Court is of the considered view that the notice, dated 18.09.2014 and the impugned Confirmation Order dated 21.02.2015 are in violation of procedure laid down under Section 228 of the Act and that the same are liable to be set aside and the representation dated 05.01.2021 submitted by the Petitioner in W.P.No.1048 of 2021 is to be considered by the respondent No.2.

17. In the result, both these Writ Petitions are disposed of as follows:-

i) The notice, dated 18.09.2014 and the impugned Confirmation Order dated 21.02.2015 in W.P.No.11587 of 2015 are set aside.

ii) The 2nd Respondent is directed to consider the representation dated 05.01.2021 submitted by the Petitioner in W.P.No.1048 of 2021 and take action in accordance with law by putting the petitioners and unofficial respondents in both the Writ Petitions on notice and by affording an opportunity of hearing.

iii) Liberty is granted to the Respondent Nos.2 and 3 in W.P.No.11587 of 2015 and Respondent No.2 in W.P.No.1048 of 2021 to initiate fresh proceedings and take steps, strictly in accordance with law.

iv) The interim orders dated 21.04.2015 in W.P.No.11587 of 2015 and dated 08.02.2021 in W.P.No.1048 of 2021 shall stand vacated.

18. As a sequel, the miscellaneous petitions, if any, pending in these writ petitions shall stand closed.