

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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WP(C) No.1575/2007

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Date of decision: 8^h December, 2010

VEERA BUILDERS

..... Petitioner

Through: Mr. Sanjay Jain, Sr. Advocate with Mr. Rahul Chaudhary & Ms. Prabhsahay Kaur, Advocates.

versus

M.C.D.

..... Respondent

Through: Mr. Ajay Arora & Mr. Kapil Dutta, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The senior counsel for the petitioner at the outset seeks to withdraw the request made on 22nd January, 2010 for adjournment of the present writ petition *sine die* to enable the petitioner to approach the respondent MCD for rectifications/modifications of the layout plan of the year 1964. It is contended that there is no need for the same.
2. The counsels have been heard.
3. The petition seeks direction to the respondent MCD to release/issue the plan for property No.C-8/3, Rana Pratap Bagh, Delhi submitted by the petitioner for sanction. The petition also seeks setting aside of all orders/actions of the respondent MCD objecting to the sanction of the said plan.

4. The petitioner claims to be the owner of plot No.C-8/3 *ad-measuring* 577.5 sq. yds. in the colony of Rana Pratap Bagh, Delhi. The petitioner further claims to have in or about the year 1963 raised construction of a single storied house on the said plot of land. The petitioner on 20th November, 1992 submitted to the respondent MCD a building plan for erection of first and second floors in the property. This plan was rejected by the Building Plan Committee of the respondent MCD *inter alia* on the ground that building activity was not permitted on the said plot as per the report of the Town Planner. Aggrieved therefrom the petitioner preferred an appeal to the Appellate Tribunal, MCD which was disposed of vide order dated 16th December, 1993.

5. The Appellate Tribunal in the order aforesaid recorded the contention of the respondent MCD that the building plan filed by the petitioner could not be sanctioned as the plot in question was on the land which had been earmarked as 'reserved' and building activity whereon was not permissible. After going through the layout plan of the colony of Rana Pratap Bagh, Delhi and the other documents, the Appellate Tribunal found that though the portion of the land (described in the order as Rectangular land) in which the plot of the petitioner was, was shown as 'reserved' land for unspecified purpose in the layout plan but the same was divided into five plots bearing No.C-8/1 to C-8/5. It was found that construction of single to 2 ½ storeys existed on the said plots and the said construction had been raised after the plans therefor had been sanctioned by the respondent MCD. Though the documents regarding sanction plot No.C-8/3 were not available but the file relating to sanction of Sanitary Plan on the

said plot was available and wherefrom the Appellate Tribunal concluded that the construction of a single storied structure on plot No.C-8/3 of the petitioner had also been with the due sanction of the respondent MCD. The Appellate Tribunal also recorded that the respondent MCD had prepared a set back plan of the said colony in the year 1963 and in which set back plan the five plots aforesaid were demarcated on the rectangular land though shown in the set back plan also as 'reserved' land. The Appellate Tribunal thus concluded that the respondent MCD as far back as in 1963 had accepted the carving out of the five plots aforesaid on the 'reserved' land and had sanctioned the plans for construction thereon thereafter only. The Appellate Tribunal thus allowed the appeal of the petitioner and set aside the order of the respondent MCD rejecting the plans for construction of the first and second floors submitted by the petitioner and directed the respondent MCD to issue the sanction plan.

6. The respondent MCD preferred an appeal against the order of the Appellate Tribunal to the Administrator, Delhi. The Administrator recorded that the respondent MCD inspite of repeated opportunities had failed to explain as to how the building plan of the ground floor of the property was sanctioned and why construction was permitted on the other five plots if the land was classified as 'reserved' land. While dismissing the appeal the Commissioner, MCD was also directed to hold an inquiry as to the delay in complying with the order of the Appellate Tribunal.

7. The respondent MCD challenged the order of the Administrator by preferring C.W.No.5770/1999. Vide interim orders dated 14th May, 2001 in the said writ petition the respondent MCD was directed to release the sanction plan

and the petitioner permitted to raise construction subject to the final outcome of the petition. However the said writ petition was dismissed vide order dated 21st November, 2001. The contention of the respondent MCD before this Court also then was that in 'reserved' area plot, there could be no construction and construction could not have been sanctioned earlier or then. This Court also granted opportunities to the respondent MCD to produce the records but upon failure of the respondent MCD to produce any records the petition was dismissed. The said order attained finality.

8. It appears that inspite of the orders aforesaid the building plans were not sanctioned/released and no construction raised. The petitioner thereafter filed W.P.(C) No.2070/2004 in this Court again for same relief. A Contempt case also appears to have been filed averring non-compliance of the orders of the Appellate Tribunal and the Administrator; vide order in the writ petition/contempt case, the MCD was again directed to sanction the plans. In the circumstance, the respondent MCD in its meeting of Building Plan Committee held on 21st May, 2004 considered the application of the petitioner. It was recorded in the minutes of the said meeting that relevant records could not be produced by the respondent MCD before the Appellate Tribunal, Administrator or this Court in the earlier round of litigation; that the land aforesaid i.e. the entire land marked as 'reserved' was in the ownership of the Land & Estate Department of the respondent MCD which had not been specifically made a party to the earlier proceedings. It was further recorded that the said land was transferred by the DLF Universal Ltd. being the developer of the colony to the Land & Estate Department of the respondent MCD in the year

1989.

The building plans were however sanctioned in compliance of the directions of this Court but without taking into consideration the issue of ownership of the land.

9. The factum of the plans having been sanctioned without taking into consideration the issue of ownership of land was also informed to this Court and accordingly noted in the orders dated 27th May, 2004 and 6th August, 2004 in W.P.(C) No.2070/2004. The plans having been sanctioned, W.P.(C) No.2070/2004 and the contempt case were disposed of.

10. It is informed that the petitioner by then was not interested in constructing the first and second floors for which sanction had been accorded and desired to reconstruct the property. The petitioner thus submitted fresh plans to MCD for reconstruction on the plot aforesaid. The respondent MCD however vide its letter dated 7th December, 2004 intimated to the petitioner that its application for reconstruction could not be acceded to, the respondent MCD having earlier sanctioned the plans for construction of the first and second floors only over the existing ground floor. Aggrieved therefrom the present petition was filed.

11. Notice of the petition was issued.

12. The respondent MCD has filed a counter affidavit pleading *inter alia* that the orders in the earlier litigation were only for sanction of the plans for construction of the first and second floors and not for reconstruction; that the earlier sanction of 21st May, 2004 (supra) was without taking into consideration the issue of ownership; that the earlier orders were not applicable to the

application now submitted by the petitioner for reconstruction; that the plot under question forms a part of the portion of the 'reserved' land as per the approved layout plan of the colony; that the ownership documents submitted by the petitioner also cast a shadow of doubt over the title of the petitioner to the land; that in the earlier litigation, the fact that ownership was disputed could not be brought to the notice of the Courts.

13. The senior counsel for the petitioner relying upon *Howrah Municipal Corporation v. Ganges Rope Co. Ltd.* (2004) 1 SCC 663 and *Dan Singh Bawa v. NDMC* 2005 (81) DRJ 473 has contended that the petitioner cannot be bound with the plans earlier submitted for addition/alteration and is entitled to take benefit of the changes in building norms since then and to now apply for reconstruction.

14. The counsel for the respondent MCD has contended that the respondent MCD as a pre-condition to sanction is required to satisfy itself of the title of the applicant to the land where construction is sought to be raised; that according to the respondent MCD the land on which the petitioner seeks to raise construction vests in the respondent MCD and the petitioner has no title thereto and thus the respondent MCD is fully entitled in refusing the sanction. The respondent MCD however besides the minutes of the meeting held on 21st May, 2004 of the Building Plan Committee in which as aforesaid it was recorded that the land was in fact in the ownership of Land & Estate Deptt. of the respondent MCD and was transferred by M/s DLF Universal Ltd. to the said Land & Estate Deptt. of the respondent MCD in the year 1989, has not placed before this Court any document whatsoever of its claim of title to the land, not even the

document of the year 1989 by which M/s DLF Universal Ltd. is stated to have transferred the land to the respondent MCD.

15. I have enquired from the counsel for the respondent MCD as to how MCD can be permitted to raise the question of title to the land when in the earlier round of litigation, the respondent MCD has already been directed to sanction the plans submitted by the petitioner for addition/alteration in the property. It was further put to the counsel for the respondent MCD that it is not as if for reconstruction the applicant is required to be the owner of the land and for the purpose of addition/alteration, is not required to be the owner. It was felt that once the right of the petitioner to sanction, whether it be for addition/alteration or for reconstruction, has attained finality in the earlier proceedings, the nature of the works for which sanction is sought would be irrelevant.

16. The counsel for the respondent MCD also could not dispute that the question of title to the land is the same, be it in plans for addition/alteration or for reconstruction. He however argues that the earlier litigation did not go into the question of title to the land.

17. I am unable to agree. This was precisely the question which was for adjudication in the earlier litigation also. The respondent MCD had then also controverted the entitlement of the petitioner to raise construction on the land but without any success.

18. The counsel for the respondent MCD however argues that the question in earlier litigation was of the land being 'reserved'; now the respondent MCD is claiming title to the land.

19. I have enquired from the counsel for the respondent MCD whether MCD after 1989 when it claims that the land was transferred to it by DLF Universal Ltd. or at least after 2004 when the said fact was recorded in the minutes of the Building Plan Committee, has taken any proceedings for recovering possession of the land from the petitioner and the other plot holders similarly situated as the petitioner. The answer is in the negative.

20. In my opinion, it is irrelevant whether the respondent MCD in the earlier proceedings expressly pleaded its ownership of the land or not. Even if it has not pleaded so (which in fact it is found to have not), it is now barred on the principle of constructive *res judicata* applicable to the writ proceedings also, from doing so. Moreover the question in the earlier litigation if not of ownership of the respondent MCD was of the title of the petitioner to the land and the right of the petitioner to raise construction on the land and the said question was decided in favour of the petitioner. The said decisions have attained finality and cannot be permitted to be re-opened merely because the petitioner has now chosen to reconstruct instead of carrying out addition/alteration.

21. The pleas of the respondent MCD in the counter affidavit to the present petition are the same as in the earlier litigation i.e. of the land being shown as 'reserved' land in the layout plan. The said pleas have already been dealt with in the earlier litigation and cannot be gone into now. The transfer even if any by M/s DLF Universal Ltd. of the said land to the respondent MCD, besides having not been shown, could be as 'reserved' land only and for which reason the respondent MCD has already been held to be not entitled to refuse sanction

to the petitioner.

22. The Supreme Court in *V.S. Charati v. Hussein Nhanu Jamadar* (1999) 1 SCC 273 held that a decision, simply because it may be wrong would not thereupon become nullity; it would continue to bind the parties unless set aside. The MCD has not taken any steps for setting aside of the judgment aforesaid. The Supreme Court in *Nirmaljit Singh v. Harnam Singh* (1996) 8 SCC 610 held that a party is required to take out proceedings for having an earlier judgment set aside. In *Mathura Prasad Bajoo Jaiswal v. Dossi Bhai NB Jeejeebhoy* (1970) 1 SCC 613 it was held that in determining the application of the rule of *res judicata* the Court is not concerned with the correctness or otherwise of the earlier judgment. A question purely of fact and a mixed question of law and fact determined in the earlier proceeding between the same parties cannot be questioned in a subsequent proceeding between the same parties. The question whether the petitioner is entitled to raise construction on the aforesaid plot of land or not is a mixed question of law and fact. This Court also in *Subhash Juneja v. UOI* 62(1996)DLT 167 held that a judgment inter parte of the competent court in a previous writ petition would operate as *res judicata* in a subsequent writ petition between the same parties where the issues directly involved in the two proceedings are the same.

23. I have further enquired from the counsel for the respondent MCD whether the respondent MCD would have been entitled to raise an objection as is now being raised, had the petitioner in accordance with the then sanctioned plan raised construction of the first and second floors and now applied for sanction for construction of the third floor. The counsel for the respondent

MCD fairly admits that the question even then would have been raised.

24. I find it preposterous and untenable in law that the same matters would be required to be adjudicated every time sanction would be applied for. The same is not in consonance with principles of finality of legal proceedings. The petitioner having succeeded in the earlier litigation is now entitled to sanction of any other nature also and the respondent MCD is barred from raising the same pleas on which in the earlier litigation have not succeeded. The Courts (*K.K. Modi v. K.N. Modi* AIR 1998 SC 1297) have held a re-litigation to be an abuse of the process of the Court. The Division Bench of this Court in *Jhalani Tools (India) Ltd. v. UOI* 2001 (57) DRJ 794 also applied the principle of constructive *res judicata* to writ proceedings.

25. In so far as the plea of the respondent MCD of the documents of title of the petitioner being doubtful is concerned, the petitioner relies on registered documents of title in its favour. The pleas of the respondent MCD in this regard are vague. In fact the respondent MCD in its communications seeking further clarifications from the petitioner upon submission of plans for reconstruction by the petitioner did not raise any query about the title of the petitioner.

26. The petition is therefore allowed. It is declared that the respondent MCD is not entitled to refuse sanction for construction be it for reconstruction or for addition/alteration to the petitioner with respect to plot No.C-8/3, Rana Pratap Bagh, Delhi on the ground of the petitioner having no title to the said land or on the ground of the said land being shown as 'reserved' land in the layout plan or on the ground of the said land having been transferred to the respondent MCD.

27. Since in the interregnum there have been further changes with respect to

the Building Bye Laws, it is deemed appropriate to direct, that upon the petitioner submitting the building plans to the respondent MCD the same shall be dealt with, processed and decision thereon taken in accordance with law and what is recorded hereinabove.

28. The respondent MCD having indulged in re-litigation, is also burdened with costs of ₹30,000/- of this petition.

**RAJIV SAHAI ENDLAW
(JUDGE)**

8th December, 2010

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