

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

Date of decision: 22nd July, 2010.

+ W.P.(C) No.9657/2009 & CM No.9503/2010 (u/O1 R-10)

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SMT. SHASHI KANTA SHARMA & ORS. Petitioners

Through: Mr. Pardeep Gupta, Mr. Suresh Bharti
& Ms. Laxmibai Leitanthem,
Advocates.

Versus

MCD & ANR. Respondents

Through: Ms. Saroj Bidawat, Advocate.
Mr. M.N. Dudeja for the
intervenor/Ram Nagar Welfare
Association.

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 petitioners, being the residents of properties abutting the main road of Ram Nagar instituted this petition restraining respondent MCD from constructing a urinal in front of their houses. This Court vide order dated 19th June, 2009 while issuing notice of the petition restrained the respondent MCD from sanctioning or constructing the urinal in front of properties No.134-137, Ram Nagar, Delhi. The said order has continued in force till

now. Vide further order dated 20th October, 2009, the respondent MCD was directed to place the decision taken to reconstruct the urinal before this Court and to also ensure that unless the urinal is completed it is not used.

2. CM No.9503/2010 has been made by the Ram Nagar Welfare Association for impleadment as a party to the writ petition. It is contended in the said application that the urinal in front of properties aforesaid has been in existence for the last over 40 years; that finding the said urinal to have been demolished, a complaint was filed in June, 2009 with the MCD for reconstruction thereof in as much as the residents and shopkeepers were facing a lot of inconvenience. Though no formal order has been made till now on the said application for impleadment, the counsel for the petitioner, the respondent MCD as well as the applicant have been finally heard on the writ petition.

3. The MCD in its counter affidavit, though has stated that the urinal is more than 40 years old and it had merely reconstructed the same and that the urinal has already been completed prior to the filing of the present petition but the photographs filed along with the said counter affidavit as well as handed over during the course of hearing and which are not in dispute show that in the name of the urinal only two un-plastered brick walls of not more than average human height exist; no sanitary or flushing equipment is seen installed therein. The photographs though show the said spot being used as a

urinal but do not depict that the construction of the urinal has been completed.

4. The facts otherwise are not in dispute. The street in question is about 25 ft. wide. While the counsel for the petitioners contends that the street has residences on one side and the residences-cum-shops on the other sides, the counsel for the applicant contends that there are residences-cum-shops on both side of the street. The semi finished urinal aforesaid is touching the front boundary wall of property of one of the petitoiners with the two unplastered brick walls supra having been erected perpendicular thereto. The said enclosure falls between the entry gates of two of the houses. The photographs also depict that while one of the houses is under construction the other appears to be semi-built.

5. The counsel for the petitioners has contended that the attempt to construct the urinal touching the front wall of the properties of the petitioners is violative of the Fundamental Right of decent living of the petitioners. Reliance is placed on ***Dr. B.L. Wadehra Vs. Union of India and others*** (1996) 2 SCC 594. It is further contended that inspite of express directions by this Court to the MCD to place before this Court the decision for having the urinal at the said spot, the same has not been placed till now. It is contended that the properties on both sides have amenities of sanitation and there is no need for a urinal in the locality. It is

contended that even MCD cannot raise construction of a urinal without sanction of plans and no sanctioned plans have been shown.

6. Per contra, the counsel for the MCD has stated that for construction of such urinals, no plans are required to be sanctioned. On enquiry whether the MCD is in possession of any records to show that urinal on the said spot has been in existence, if not for 40 years as alleged, at least since prior to the filing of the petition, the counsel for the respondent MCD has fairly stated that no such records are available with the MCD.

7. The counsel for the applicant has contended that the road in question falls in mixed land use area; that there are *tehbazari* sites also on the said road; that there are other similar urinals also on the same road and that the petitioners have straightaway approached this Court without making any representation whatsoever to the respondent MCD and for which reason alone the petition is not maintainable. He has also handed over a list of November, 2007 of Toilet Complexes, Dhalaos and Urinal Blocks in Shahdara South Zone and in which at Serial No.147 in the Ward of Jagatpuri, a urinal is stated to be existing at the location of Ram Nagar, L.N. Mandir.

8. Section 359 of the DMC Act, 1957 deals with public latrines, urinals etc. and empowers the Commissioner to provide and maintain in “proper and

convenient places” a sufficient number of public latrines and urinals. Sub-section (2) further provides that such public latrines and urinals shall be so constructed so as not to be a public nuisance and are to be provided with all necessary conservancy establishments and are to be regularly cleansed and kept in proper order.

9. There can be no manner of doubt whatsoever that the construction of urinal at the entry point of a property is certainly detrimental and a source of nuisance and prejudicial not only to the property (bringing down the value of the property) but also to the occupants of the property. Having gauged the situation of the urinal from the photographs handed over and the experience of maintenance of such urinals/toilets by the Municipality, there is no manner of doubt whatsoever that the foul smell emanating therefrom will make it impossible for the occupants of the property to keep their doors and windows open. The question which arises for consideration is as to how the said private interest of the said property owners is to be balanced with the public interest. The contention of the counsel for the petitioners of all the properties having sanitation amenities and thus no urinal being required loses sight of the requirement of the visitors to the shops in the said properties. None has suggested that properties have provided for urinal/toilet amenities for the public also.

10. This Court in *Muni Lal Vs. MCD* AIR 1998 Delhi 79 & *Nizamuddin East Colony Association (Regd.) Vs. UOI* MANU/DE/0629/2000 has held that the courts should not interfere in the decision of the MCD qua the placement of such urinals/toilets. I have also recently in W.P.(C) No.4562/2010 titled *Manish Gupta Vs. MCD* decided on 13th July, 2010 followed the same view. However notwithstanding the said legal position, the facts of the present case stand out. The urinal is just outside and touching the front boundary wall of properties which even if used partly for commercial purposes, are definitely residential. The respondent MCD inspite of directions of this Court has failed to produce any decision of the Commissioner or delegatee of the Commissioner of the said place being proper and convenient for a urinal. The only inference is that there is none. The MCD appears to have been swayed by certain elements in filing the counter affidavit before this Court. As aforesaid a definite stand has been taken in the counter affidavit that the urinal has been in existences for more than 40 years. On enquiry as to on what basis it has been so stated, the counsel could only explain that it was on the basis of a complaint received in the year 2009 from some of the residents. The said complaint is of none other but of the Applicant Association aforesaid. Ordinarily the petitioners should also have been the members of the Association and the issue should have been internally resolved. However the same has not happened. It appears that some of the residents/occupants of properties on the road are in favour of the urinal and others opposed thereto.

11. This Court would still refrain from adjudicating whether the urinal should be there at the said spot or not. However from the failure of MCD to place the decision if any of the Commissioner inspite of directions, it is clear that the decision as to whether the said place is proper and convenient or not and whether it will be a nuisance or not and whether the necessary conservancy and cleaning establishments can be provided therein or not as required to be taken under Section 359 (2) of the DMC Act has not be taken. It is sad that in the name of urinal the semi constructed enclosure aforesaid without even any provision for flushing has existed at least for the last over one year since when the writ petition has been pending. I entertain no manner of doubt whatsoever that the very continuance of the same is an eyesore and a sanitation and hygiene issue.

12. The writ petition is thus disposed of with the following directions:-

- (i). The respondent MCD to within two weeks hereof remove the semi constructed walls jutting out from the front boundary wall of the property and enclosure stated to be serving as a urinal.
- (ii). The Commissioner, MCD to, after inviting representations from and hearing all the concerned parties i.e. the residents and occupants of the surrounding properties and after assessing the requirement if any for a urinal on the said spot and also as to

whether the urinal if required, can be at any other suitable and proper place, take a decision as required under Section 359 of the DMC Act within six months herefrom. The Commissioner, MCD to record reasons for opting for a particular location. It is however clarified that it will be open to the Commissioner to, after the said procedure, choose the same spot subject matter of this writ petition. However the parties shall have their remedies if any against the said decision of the Commissioner, MCD.

The petition is disposed of. The parties to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

22nd July, 2010
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