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

+ W.P.(C) 11008/2009

% **Date of decision :** 10th Febraury, 2010

ELLAR TRADERS Petitioner
Through Mr. Arun Khosla, Adv.
versus
MCD & ANR. Respondent
Through Mr. Ajay Arora, Adv. for
MCD.
Mr. Vikas Gupta and Ms. Meenakshi,
Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

ORDER

1. The petitioner is a partnership firm in occupation of a commercial premises bearing No. 476, Esplanade Road, Delhi, measuring 15" × 41" (premises for short). Rattan Chand Jwala Nath Trust, the respondent no.2 is the landlord of the premises.

2. The petitioners have been in occupation of the aforesaid premises since 1986-87 and were earlier carrying on the business of retailing of cycle spare parts. The petitioner is registered under the Shops and Establishments Act, 1954, for which a certificate was issued on 20th March, 1987. On 16th August, 2000, the respondent No.1, MCD had issued a license to the petitioner for carrying on the trade of sale of cycle spare parts in the premises.

3. On 23rd June, 2009, the petitioner had filed an application with the respondent, MCD for carrying on business of eating house/restaurant from the premises. This application has been rejected by the respondent, MCD by the impugned order dated 7th August, 2009 on following grounds:-

- “1. No proof of legal occupancy i.e. Current Rent Receipt, Current Rent Agreement and NOC of landlord.
2. No DJB & Electricity Bill in favour of applicant.
3. Running under unhygienic and insanitary conditions.

4. Does not fulfill the technical conditions as laid out by the Deptt.
5. Complaint/Objection from the landlord.”

4. In the counter affidavit filed by the respondent, MCD, the said reasons have been reiterated.

5. Application dated 23rd June, 2009 submitted by the petitioner was for issue of license under Section 417 of the Delhi Municipal Corporation Act, 1957 (hereinafter referred to as the Act). The said provision reads as under:-

- “417. Premises not to be used for certain purposes without licence.-(1) No person shall use or permit to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a licence granted by the Commissioner in this behalf, namely:-
- (a) any of the purpose specified in Part I of the Eleventh Schedule;
 - (b) any purpose which is, in the opinion of the Commissioner dangerous to life, health or property or likely to create a nuisance;
 - (c) keeping horses, cattle or other quadruped animals or birds for

- transportation, sale or hire or for sale of the produce thereof. Or
- (d) storing any of articles specified in Part II of the Eleventh Schedule except for domestic use of any of those articles: Provided that the corporation may declare that premises in which the aggregate quantity of articles stored for sale does not exceed such quantity as may be prescribed by bye-laws in respect of any such articles shall be exempted from the operation of clause (d)
- (2) In prescribing the terms of licence granted under this Section for the use of premises as mills or iron yard or for similar purposes the Commissioner may, when he thinks fit, require the licensee to provide a space or passage within the premises for carts for loading and unloading purposes.
- (3) The Corporation shall fix a scale of fees to be paid in respect of premises licensed under sub-section (1)
- Provided that no such fee shall exceed five hundred rupees.

6. Section 417 of the DMC Act applies when conditions mentioned in any of the sub- causes (a) to (d) are satisfied. Clause (a) of the Section applies when premises is to be used

for any other purposes mentioned in Part 1 of 11th Schedule. Clause (d) applies when a premise is to be used for storage of articles mentioned in Part 2 of 11th Schedule except when the storage is for domestic purpose and under the proviso the corporation is entitled to fix the quantity of articles that can be stored for sale without obtaining a licence under clause (d). Clause (b) to Section 417 of the Act states that premises shall not be used, for a purpose which is dangerous to life, health or property or is likely to create a nuisance, without a licence and only as per the terms of the licence granted by the Commissioner. Clause (c) stipulates that no person will keep horses, cattle, or other quadruped animals or birds for transportation, sale or hire or sell or produce thereof without a license.

7. Section 417 of the Act does not envisage or require submission of 'no objection certificate' from the landlord. In fact, the object behind Section 417 is to ensure that the persons residing and operating in the locality should not be put to

unwarranted inconvenience and harassment by the business activity undertaken from a particular premises. It envisages regulating activities in compliance with law and enactments, in order to ensure both, ecological and healthy living conditions for the people living/residing in or visiting the locality as well as the systematic development and use of land in terms of statutory rules and regulations to promote the quality of life. Highlighting this aspect in ***Bahadur Singh versus Municipal Corporation of Delhi*** **AIR 1974 Del 100**, scope of Section 417 of the Act was examined and it was observed that the Commissioner has to exercise his power under the said provision for issue or rejection of license to effectuate the purpose of the Act. The power is not absolute or unguided and has to be used reasonably. It was also observed that Section 417 of the Act does not impinge upon Article 19(1)(g) of the Constitution but imposes reasonable restriction and that the said provision controls issue of licences as part of regulation of economic

activity but has to be exercised in a reasonable manner. Vires of Section 417 of the Act was upheld, inter alia, holding :-

“Keeping in view the object and purpose underlying the provisions of Section 417 it is obvious that the Commissioner has to exercise the power conferred upon him under Section 417 to grant or refuse to grant licenses in a manner which would effectuate the said object and purpose. In my view, the provisions in Section 417 itself provide sufficient guidance to the Commissioner in the exercise of power under Section 417. The Commissioner has to exercise the power conferred upon him under Section 417 to grant or refuse to grant a license in a manner which would effectuate the said policy and purpose. The various articles enumerated in Part II of the 11th Schedule are of such a variegated nature that it may indeed be impossible to envisage and prescribe beforehand the terms and conditions to be imposed in the matter of storing each of the said articles. The Commissioner will have to consider in each case the locality in which the premises is situate, the nature and quantity of the article which is sought to be stored in the said premises and the safeguards which may have to be insisted to be taken before the license to store the article is granted, keeping in mind the policy and purposes mentioned above. The said policy and purpose of avoidance of danger to life and health or property or creation of a nuisance are quite clear from the provisions of Section 417 itself and they provide sufficient guidelines or criteria for the exercise of power conferred by the section.”

8. In ***M/s. Cycle Equipment Pvt. Ltd versus Municipal Corporation of Delhi and others*** ILR (1981) II Delhi 639, the Court held that the object of the licensing provisions under Section 413 read with Section 417 of the Act is to ensure that no objectionable industrial activity is carried out contrary to rules and regulations and secondly no nuisance is caused to the inhabitants or visitors in the area. It was observed that :

“33. Under Section 416 and 417, it is the duty of the Corporation to ensure and activity is not objectionable by reason of the density of population in the neighbourhood or is not such as would cause nuisance to the inhabitants. Where the Commissioner is of the opinion that a trade or an industry is dangerous to life, health or property or is likely to create a nuisance he is entitled to refuse permission to use any premises for such an activity. These are essentially the executive and administrative functions of the Corporation. These matters are regulated by providing appropriate conditions in the permit or the license. We have noted that the terms of license in the instant case expressly oblige license-holder to comply with these conditions.”

9. In ***Joginder Kumar Singla and others versus GNCT of Delhi*** ILR (2005) I Delhi 107 it was observed:

“11. Thus the Court has pointed out that use of buildings, according to the Regulation, is with a view to achieve the larger purpose, the public health, safety or general welfare. It is in view of this when a building is approved for residential purposes and is allowed for commercial purposes, it would be contrary to law and all authorities entitled to issue license or permission are duty bound to see that sanctioned plan as well as completion certificate before issuing license or permits, as the case may be. If the use zone does not allow the use of a building for a purpose other than residence, the building is permitted for residential use only and the completion certificate is granted for that purpose only, then other authorities are duty bound by the said certificate and if satisfied on production of such certificate that the building can be used for commercial purpose, then license can be issued to carry on trade or business. This would obviously apply to the M.C.D. also while issuing certificate for running shop or business or factory.”

10. The power under Section 417 is conferred on the Commissioner in larger public interest. While deciding the question of grant or rejection of a licence, the Commissioner is required to take into consideration whether the activity is likely to cause harm or is dangerous to life, health and property and would cause nuisance, etc. It is the opinion of the Commissioner which determines whether or not license should

be granted and not the opinion of the landlord which may or may not be justifiable or reasonable. An order under Section 417 of the Act cannot be biased or motivated but must be based upon larger public interest. In this context opinion of the Commissioner matters and the reasons thereof should be apparent or mentioned in the Order. The said statutory functions are to be discharged by the Commissioner by making necessary enquiries and by all means and measures that may be lawful but the Act nowhere requires a no objection certificate from the landlord as a precondition for issue of licence under Section 417 of the Act. Such a precondition or requirement will be contrary to the very object and purpose of protection granted to tenants under the Delhi Rent Control Act and would mean that it is for the landlord to decide whether or not to grant permission instead of the Commissioner who is authorized under the said Section. A motivated or malafide action/inaction of the landlord cannot defeat right to licence and carry on trade/business in accordance with law.

11. As far as occupation of the premises by the petitioner as a tenant is concerned, the same is an undisputed fact. The respondent No.2, landlord also does not dispute that the petitioner is a tenant of the premises. In these circumstances, I do not think that the respondent, MCD was justified in rejecting the application of the petitioner on the ground that no proof of legal occupancy i.e. current rent receipt or current rent agreement was required to be filed. The respondent, MCD was/is entitled to make an investigation to be satisfied that the petitioner or any other applicant is in authorized and legal possession of the premises, for which license is required. Law recognizes right to occupy and possession of a statutory tenant or a tenant holding over. Legal right of a tenant to possession is not dependent upon no objection certificate by the landlord, production of current rent receipt or current lease agreement alone. It can be established otherwise. Once authorized occupation or possession is prima facie established, licence can be issued.

12. It is noted that in the present case, there was no inter se dispute or litigation pending between the petitioner and the respondent No.2, landlord on the allegation that the petitioner had/has unauthorizedly occupied the premises and was/is a trespasser. It is well known that Delhi Rent Control Act, 1958 protects tenancies when rent is less than Rs. 3,500/- per month. Calling upon such applicants to obtain a 'no objection certificate' or rent receipt or current lease agreement from the landlord will make them susceptible to harassment and illegal demands by the landlord, who, may deny and not issue the same. Keeping in mind the nature of protected tenancy in Delhi and the vulnerability of tenants, such a requirements are likely to cause a bonafide and protected tenant unwarranted hassles. A no-objection certificate from the landlord etc., when an applicant has fulfilled other pre-requisites under law, is not contemplated, much less justified.

13. In the absence of express covenant in a contract restricting or barring an activity, implied provisions under Section 108 of the Transfer of Property Act, 1882 can be taken into consideration. Implied covenants under Section 108 (o) of the Transfer of Property Act 1882 requires the lessee to use the land as a man of ordinary prudence and not to use it for a purpose different to that for which it was leased. For violation of Section 108(o), the landlord must show not only that the property was used for a different purpose than that for which it was rented, but that the use is destructive or injurious. As long as the interest of the landlord is not prejudiced, a small change of user may not be actionable. In ***Ram Saroop v M/s Janki Dass Jaikumar AIR1976 Del 219***, it was held that where the original letting of the shop is not for any specific purpose and the shop was used for carrying on the business of food grains, the mere change in the user of the shop for setting up a flour mill does not amount to user for purposes other than that for

which it was leased. Following paragraph of the decision apposite:

“8. Section 108 of the Transfer of Property Act provides that in the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another respectively, possess the rights and are subject to the liabilities mentioned in the rules set out in the section. The rule in cl (o) of the section provides that the lessee must not use the property for a purpose other than that for which it was leased or damage buildings belonging to the lessor, or commit any other act which is destructive or permanently injurious thereto. It has to be noted that the said provision consists of two parts, and violation of either of them would constitute a separate cause of action. The first part sets out the liability of the tenant not to use the property for a purpose other than that for which it was leased. Obviously, this part would be attracted only if the property was leased for a specific purpose. The second part sets out the liability of the tenant not to damage the property or commit any other act which is destructive or injurious thereto.”

14. Thus, as per Section 108 (o) in the absence of a statutory prohibition or restrictive covenants, the tenant has the right to use the demised premises for purposes which do not create public nuisance or damage the premises.

15. In ***Re SG Assurance Co AIR 1965 Cal 16***, it was held that if the premises are let for business purposes, they may be used, in the absence of an express covenant, for any lawful business which is not a nuisance. Similarly, in ***Dattatrey v Gulabrao (1978) Mah LJ 545***, the Court held in order that a landlord may invoke the provisions of Section 108(o), when he shows that not only that the property was used for a different purpose than that for which it was rented, but also that the use is destructive of or permanently injurious, to the property. Before the landlord can rely on act as one in contravention of section 108(o), injury must be proved. In ***Hari Rao v N. Govindachari & Others (2005)7SCC643***, the Supreme Court observed as under:

“6. In other words, when the lease is granted for the purpose of a trade, in the absence of any covenant in the contract between the parties prohibiting a user different from the particular one mentioned in the lease deed, the tenant would be entitled to carry on any trade in the premises, consistent with the location and the nature of the premises. In a case where the premises let out for a

commercial purpose are used by the tenant for a residential purpose, it would be a user for a purpose other than that for which it was leased attracting Section 10(2) (ii)(b) of the Act. Similarly, if a building had been let out for the purpose of a trade, but a tenant uses the premises for the purpose of manufacture or production of materials after installing machinery, that would be a user other than the one for which the building was let. User of the building let out for a trade as a godown may attract the provision. Ultimately, the question would depend upon the facts of a particular case, in the context of the terms of the letting and the covenants governing the transactions and the general spirit of Section 108(o) of the Transfer of Property Act, 1882. Merely, because a shop let out for trade in shoes and other leather goods is used by the tenants also for the purpose of trading in readymade garments, it could not be held to be a user by the tenant of the premises for a purpose other than that for which it was leased.....”

“7. Merely because a tenant, who has taken a building for the purpose of running a trade, alters the commodity in which he was trading when he took the building on lease or trades in other commodities also, he could not be held to be using the premises for a purpose other than the purpose for which it was let. The purpose has to be understood, as the purpose of trade and in the absence of a covenant barring the using of it for any other trade, it will be open to the tenant to use the premises for expanding his trade or even for taking up other lines of trade as befits prudent trader.”

16. However, when there is an express bar or prohibition in the lease, provisions of section 108(o) of the Transfer of Property Act may not apply and the position may be different.

17. There appears to be some dispute between the petitioner and the respondent No.2 about the terms of the lease. Both parties are relying upon an unregistered and under-stamped document. The petitioner alleges interpolation and changes in the original document and in this connection, my attention has been drawn to the manner in which the last sentence of paragraph 4 is written in the document relied upon by the respondent no.2. Counsel for the petitioner states that the said sentence had been added subsequently. Counsel for the respondent no.2 disputes the said contention and states that no interpolation and changes have been made in the rent deed. This is a matter of private dispute between the petitioner and the respondent No.2. It is open to the respondent No.2 to initiate proceedings in case he feels that the petitioner is violating mutual terms and conditions agreed upon between the parties. The question whether any interpolation or changes have been made in the rent deed is left open and has not been adjudicated upon in the present writ petition. It is clarified that this order will not come in the way of the Civil Court, which will independently apply its mind in respect of the said dispute and

claims made by the petitioner and the respondent No.2.

18. Similarly, objection No.4 that the petitioner does not fulfill technical conditions is vague. The respondent MCD should have indicated what technical conditions have not been fulfilled by the petitioner. The last reason that a complaint has been received from the landlord again does not justify rejection of petitioner's application. A complaint or objection may be justified or unjustified but a mere complaint or objection by the landlord cannot be a ground to reject an application. A genuine complaint/objection may justify rejection but a motivated or wrong complaint should be ignored. However, investigation and examination as to the rights of the person, who has made the application, is required to be made. There can be cases wherein on the basis of the objection/complaint by the owner or neighbours, the application may be rejected on merits. But a mere complaint or objection alone cannot be a ground for rejection of an application under Section 417 of the Act, without having any discussion and satisfaction about the merits of the

complaint.

19. With regard to submission of electricity and water bills, counsel for the petitioner submits that these were filed along with the application itself. In case, the respondent, MCD had not received copy of these bills, the petitioner should have been called upon and asked to submit them. An opportunity should have been granted to the petitioner to furnish the documents.

20. Regarding unhygienic and insanitary conditions, counsel for the petitioner has submitted that the restaurant was still to be made functional. It is accordingly submitted that the said reason is presumptuous and wrong. Counsel for the respondent, MCD, on the other hand, has stated that they have received photograph along with a complaint from the respondent No.2, which shows that the petitioner had already started the eating house/restaurant. It is not clear from the affidavit of the respondent, MCD whether any spot inspection was carried out to verify the actual conditions and whether the petitioner had made requisite arrangements or was in process

of making requisite arrangements for ensuring hygienic and proper sanitary conditions. However if the petitioner was acting contrary to law, action in accordance with law should be taken against him.

21. In these circumstances, the impugned order dated 7th August, 2009 is quashed and set aside with a direction that the respondent, MCD will re-examine the application of the petitioner along with the additional documents, which the petitioner will file within 15 days. Thereafter, within one month, a speaking order will be passed by the respondent, MCD. It is clarified that it is open to the respondent, MCD to take action as per law in case the petitioner has violated any provision of the Act.

The writ petition is accordingly disposed of.

SANJIV KHANNA, J.

**FEBRUARY 10, 2010
NA/P**