

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

Date of decision: 23rd July, 2010.

+ W.P.(C) 11305/2009, CM No.10831/2009 (u/S 151 CPC for stay), CM No.9694/2010 (u/O1 Rule 10 of CPC for impleadment) & CM No. 331/2010 (u/O1 Rule 10 of CPC for impleadment).

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L.M. MADHAN

..... Petitioner

Through: Mr. Raman Kapur, Advocate

Versus

M.C.D. & ORS.

..... Respondents

Through: Mr. Sanjeev Sabharwal & Mr. Alok Singh, Advocates.
Mr. Y.K. Gupta & Mr. P.C. Srivastava for the applicant in CM No.331/2010 & CM No.9694/2010.

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 petitioner claiming to be an agreement purchaser in possession of the rear portion of property No.B-1/26, Vasant Vihar, New Delhi has filed this petition impugning the order dated 20th August, 2009 of the respondent MCD of demolition of the entire construction in the said rear portion averring the same to be unauthorized as well as the order of sealing of the said portion. Mandamus is also sought for de-sealing of the property. Directions are also claimed against the respondent MCD to act in terms of their statement to this Court in order dated 5th August, 2002 in the earlier writ petition being WP(C) No.376/1998 preferred by the petitioner.

2. WP(C) No.376/1998 was disposed of vide order dated 5th August, 2002 which is reproduced herein for convenience:

“ This writ petition has been filed by the petitioner for the following relief:

- a) especially in the nature of mandamus directing the respondent no.1 to entertain the application of the petitioners dated 15.01.98 for regularization of the construction in the rear portion of the property bearing No.B-1/26, Vasant Vihar, New Delhi in accordance with the Appendix to the Delhi Building Bye-laws and decides regularize the compoundable area and not to demolish the said portion of the property.
- b) direct the respondent no.1, if necessary, to make a statement in this regard to having joined in the application dated 15.01.98 or directing him to sign the said application and / or any other documents which may be required for the purpose of regularization of the compoundable area of the rear portion of the property bearing No.B-1/26, Vasant Vihar, New Delhi.
- c) any other order or further orders as this Hon'ble Court may just deem fit and proper in the facts and circumstances of the case, be passed.

Learned counsel for respondent no.1 states that no non compoundable deviation exists at the site and that no action is thus warranted by respondent no.1. Respondent no.2, however disputes the position.

Learned counsel further states that in so far as the application of the petitioner for compoundable deviation is concerned, the same will be decided in accordance with law within a period of 8 weeks from today. Learned counsel for the petitioner states that in view of the aforesaid statement of learned counsel for respondent no.1 and in view of the change of policy for regularization of property the petitioner does not wish to prosecute the writ petition. The writ petition is dismissed as withdrawn.”

3. It is the case of the petitioner that notwithstanding the statement aforesaid of the MCD, the MCD has till date not made any order whatsoever with respect to the application of the petitioner for regularization of compoundable deviations in the rear portion of the property. The counsel for the petitioner contends that till decision on his application for compounding, no orders for demolition and sealing could have been made. Notice of the writ petition was issued and a counter affidavit has been filed by the respondent MCD. The respondent MCD has in the counter affidavit *inter alia* stated that the property was found locked and as such inspection could not be carried out and thus it could not be verified whether the non compoundable portions had been removed by the petitioner or not. With respect to the demolition order, it is stated that the same has been passed in accordance with law.

4. CM No.331/2010 has been filed on behalf of Mr. O.P. Gupta by his son Mr. Y.K. Gupta, appearing in person, for impleadment of the said Mr. O.P. Gupta as a party to this petition. The same applicant has also filed CM No.9694/2010 for impleadment of DDA as party to this writ petition. Mr. Y.K. Gupta has been heard. He has contended that the petitioner has concealed from this Court regarding the Contempt Case No.118/2003 filed by him against the respondent MCD for non compliance of the statement contained in the order dated 5th August, 2002 (*supra*). He has handed over a

copy of the order dated 31st July, 2003 in the said CCP No.118/2003. The said contempt case was dismissed because this Court did not find any direction to the MCD in the order dated 5th August, 2002. Mr. Y.K. Gupta has also handed over in the Court the affidavit filed on behalf of MCD in the CCP No.118/2003 aforesaid and in which the MCD had *inter alia* stated that it had received various representations from Mr. O.P. Gupta against regularization of the property; that it could not decide the application of the petitioner herein for regularization owing to the premises having been found locked and the petitioner having not removed the non compoundable deviations.

5. Mr. Y.K. Gupta further contends that the petitioner has no right to regularization inasmuch as he is not the owner of the rear portion of the property. It is contended that there is no Sale Deed in favour of the petitioner and the petitioner is only the agreement purchaser from the co-owner of Mr. O.P. Gupta aforesaid. Reliance in this regard is also placed on ***Prahlad Vs. Laddevi*** AIR 2007 Rajasthan 166 relating to the Power of Attorney transactions. He further contends that regularization cannot be done since the perpetual lease of the land underneath the premises has been cancelled.

6. I have enquired from Mr. Y.K. Gupta whether Mr. O.P. Gupta was a party to the earlier writ petition culminating in the order dated 5th August, 2002. The answer is in the affirmative. Mr. Y.K. Gupta on enquiry further informs that the order of cancellation of the perpetual lease of the land underneath the property is also prior to order dated 5th August, 2002.

7. The applicant having been a party to the earlier writ petition in which the order dated 5th August, 2002 was made, the applicant is not entitled to oppose the prayer of petitioner for consideration of his application for regularization in terms of order dated 5th August, 2002 in the earlier writ

petition on grounds / facts which existed at the time of the said order.

8. As far as the filing of the Contempt Petition by the petitioner with respect to the order dated 5th August, 2002 is concerned, the counsel for the petitioner admits that the same has not been disclosed in the writ petition. However, it will be seen that the writ petition was filed after nearly six years of the dismissal of the Contempt Petition. The cause of action for the writ petition was order of demolition and sealing of the property. It was only in that context that reliance is placed by the petitioner on the order dated 5th August, 2002 in the earlier writ petition. The petitioner had nothing to gain from concealing the filing and dismissal of the contempt case.

9. In my opinion, the dismissal of the contempt case by the petitioner would not really make any difference inasmuch as all that has been held in the order dismissing the contempt case is that there was no direction in the order to the MCD owing to non compliance of which it could be held guilty of contempt. However, the fact remains that the earlier petition filed by the petitioner for regularization of the construction existing in the rear portion was withdrawn by the petitioner on the basis of the statement of the respondent MCD that no non compoundable deviations exist at the site and that the application of the petitioner for compoundable deviations will be considered in accordance with law. Not only so, it was also stated that no non compoundable deviations existed at site. The counsel for MCD is unable to explain the change in the stand.

10. As far as the contention of the MCD of inability to comply with the said statement owing to the premises having been found locked, it is felt that instead of entering into the said factual controversy, an opportunity be given by fixing a time schedule for the parties to comply with the statement in the order aforesaid in the earlier writ petition.

11. The counsel for the MCD at this stage draws attention to para 7 of the counter affidavit stating that the petitioner had again started carrying out unauthorized construction in the rear portion in the shape of alteration in the existing building by closing of windows, balconies and removal of existing walls at Ground Floor, First Floor and Second Floor without any sanctioned building plan and which is claimed to have been booked. The MCD is certainly entitled to stop any further unauthorized construction and has for that purpose already sealed the property. However, that cannot come in the way of it complying with its statement aforesaid. The counsel for MCD further draws attention to the averment in the counter affidavit of the applicant for regularization having already been dismissed. However, he admits that the same was prior to 5th August, 2002.

12. Mr. Y.K. Gupta has also contended that there is no partition of the property into rear and front portion and the applicant Mr. O.P. Gupta and Mr. S.C. Goel, from whom the petitioner claims to have agreed to purchase the rear portion, were the owners of undivided share in the property. I have enquired from Mr. Y.K. Gupta as to who is in possession of the front portion of the property. He states that Mr. O.P. Gupta and his family are in exclusive possession of the entire front portion of the property. I have put to him that if it is his case that Mr. O.P. Gupta and Mr. S.C. Goel were the undivided owners of the property, whether he as an attorney of Mr. O.P. Gupta is willing to let Mr. S.C. Goel or his representative or heirs into possession of one half of the front portion so that the entire rear portion which according to him is illegal and compounding whereof he is objecting to can be demolished. He is not willing for the same.

13. On the contention of Mr. Y.K. Gupta of regularization being not possible owing to the lease of the land underneath the property having been cancelled, it was put to him whether he is willing to put the superior lessor of the land underneath the property into possession since according to him

the property has been re-entered. He states that Mr. O.P. Gupta himself has challenged the re-entry and till date the possession has not been taken over. Thus the cancellation of perpetual lease which is *subju dice* also cannot come in the way of regularization.

14. The judgment cited by Mr. Y.K. Gupta is contrary to the judgment of Division Bench of this Court in Asha M. Jain Vs. Canara Bank MANU/DE/1304/2001 laying down that judicial notice has to be taken of practice of Power of Attorney sales prevalent in Delhi.

15. In the opinion of this Court, the MCD ought to first, in accordance with its statement aforesaid, decide the application of petitioner for regularization to the extent permissible of the construction in rear portion of property. However, since the land has not been sub-divided and the FAR thereon is to be shared between the front and rear portion, it is expedient that the applicant O.P. Gupta be also heard by the MCD. Depending on the said decision of MCD the unauthorized portions can be demolished and the power of sealing used with respect to the said unauthorized portion.

16. In the circumstances aforesaid, this writ petition is disposed of with the following directions:

- (i) The MCD to in accordance with its statement in the order dated 5th August, 2002, consider the application of the petitioner for regularization of compoundable portions in the rear portion of the property after hearing the petitioner as well as Mr. O.P. Gupta aforesaid.
- (ii) The petitioner as well as Mr. O.P. Gupta or their representatives to appear before the Executive Engineer-I (South Zone), Green Park, New Delhi of the respondent MCD for the purpose on 30th July, 2010 at 16:00 hours.

- (iii) The Executive Engineer, MCD will be at liberty to inspect the property; the date therefor be also fixed in the presence of the petitioner and Mr. O.P. Gupta aforesaid.
- (iv) The MCD to pass an order on the said application of the petitioner on or before 30th August, 2010. If the property or any part thereof is found to be compoundable, the MCD shall give an opportunity to the petitioner to remove the non compoundable portions and de-seal the property for the said purpose. The petitioner through counsel undertakes to this Court not to make any additions, alterations and not to permit any use of the property for residential or for any other purposes (the counsel for petitioner states only the security guard of petitioner lives in the rear portion) till the aforesaid exercise is carried out.
- (v) The MCD shall be entitled to proceed in accordance with law with respect to the unauthorized portions.

17. Mr. O.P. Gupta's attorney having been heard fully, his applications are redundant. For the reasons aforesaid, need is not felt to hear the DDA, being the lessor of land underneath the property for disposal of the writ petition.

Dasti under signature of the Court Master to the counsel for the parties.

**RAJIV SAHAI ENDLAW
(JUDGE)**

23rd July, 2010
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