

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

Date of decision: 17th September, 2010.

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W.P.(C) 11361/2009

S.S.P.BUILDCON P. LTD.

..... Petitioner

Through: Mr. Rajeev Mehra, Sr. Advocate with
Mr. Ananya Kumar and Mr. S. Bajaj,
Advocates.

Versus

M.C.D. & ANR.

..... Respondents

Through: Mr. Mukesh Gupta with Mr. Sumit
Gupta, Advocates for MCD.
Mr. Ajay Verma with Mr. Amit
Mehra, Advocate for DDA.

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? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported
in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The petitioner claiming to be the owner of land bearing Khasra no. 230, 231-238, 239 and 240 admeasuring 23 bighas and 18 biswas situated at Mathura Road, Village Mauza Bahapur, Delhi has preferred this petition seeking the relief of directing the MCD to consider the application submitted by the petitioner for sanction of layout for construction of a flatted

factory on the subject land *de hors* the stand taken by the DDA and for quashing of the communication dated 23rd March, 2009 and any other communication issued by the DDA to MCD whereunder DDA has claimed title and possession of the subject lands and/or directed the MCD not to accord permission to the petitioner for construction on the said land. The petitioner has also claimed the relief of quashing of the communication dated 23rd March, 2009 or other communication sent by DDA to the Land Acquisition Collector (South) and the Sub Divisional Magistrate (Kalkaji) wherein DDA has requested the said authorities to update their records to show DDA as the owner and in possession of the subject land. The petitioner also seeks the remedy of declaration of, the Handing Over report dated 22nd September, 1986 and Notification dated 6th October, 1986, as illegal.

2. It is *inter alia* the case of the petitioner that the said land belonged to Delhi Shimla Catholic Archdiocese (DSCA) and Associated Cement Companies Ltd. (ACC) were lessee thereof. The petitioner claims to have acquired the land from the said DSCA and ACC. The petitioner further claims that ACC had instituted writ petition no. 2563/1986 in this court for quashing of the award dated 19th September, 1986 purportedly of acquisition of the said land. The said writ petition was allowed vide judgment dated 23rd April, 2004 of this Court reported in 2004 V AD (Delhi) 484; it was held that there being no declaration under Section 6 of the Land Acquisition Act,

1894 with respect to the said land, there was no acquisition and the award dated 19th September, 1986 with respect to the land could not have been made. DSCA also preferred WP(C) 667/1987 in this Court in this regard. On the basis of the judgment in the writ petition by ACC, the writ petition filed by DSCA was also allowed on 24th March, 2005. It is pointed out that though in the writ petition filed by ACC, DDA was not a party, it was a party in writ petition filed by DSCA and thus expressly bound by the judgments. It is the contention of the senior counsel for the petitioner that notwithstanding the said judgments which have attained finality, DDA continues to represent that the land was acquired and vested in it and owing whereto the MCD was not processing the application of the petitioner for construction on the said land.

3. Notice of the petition was issued on 2nd September, 2009. The matter has been adjourned thereafter from time to time. The respondent DDA has filed a counter affidavit pleading that pursuant to acquisition the land vests in it.

4. The matter was listed before this Court on 30th July, 2010 when the counsel for DDA stated that notwithstanding its stand in the counter affidavit, DDA had been unable to produce the Notification under Section 6 of the Land Acquisition Act on the basis whereof it was pleaded that the land was acquired and vested in it. The counsel for the DDA on that date

stated that a last attempt would be made to trace the said Notification within 15 days and if the Notification cannot be found within the said time, the respondent DDA would not be able to substantiate its stand in the counter affidavit of the land having been acquired. The counsel for the petitioner had opposed the said request of DDA on that date. However, last opportunity of 15 days was given on that date to the DDA for placing the Notification under Section 6 of the Act with respect to the land and it was made clear that if the Notification was not produced, the Court will proceed on the premise that the land has not been acquired.

5. Though the matter was adjourned to 25th August, 2010 but could not be taken up on that date and has come up today for consideration. The counsel for DDA has stated that after the order dated 30th July, 2010 hectic efforts were made to trace the Notification. It is contended that since the records of the acquisition would be with the Land and Building Department and which has not been impleaded as a party in the present case, the officials of the DDA have had to liaison with the Land and Building Department to dig out the record. It is stated that only some of the records have been traced till now and efforts for remaining records are underway. The counsel for DDA has today in Court handed over a copy of a Notification dated 6th January, 1969 under Section 6 of the Land Acquisition Act with respect to the land *inter alia* in Khasra No. 225-235 and 239 in the aforesaid village. He has also handed over a copy of the Delhi Gazette of 16th January, 1969

publishing the Notification dated 19th November, 1968 under Section 4 of the Land Acquisition Act with respect to the land in Khasra No. 231-238, 239/1, 239/2, 240/1/2, 240/2 and 241/2.

6. The counsel for DDA states that further time be granted so that the documents in support of acquisition duly supported by an affidavit can be placed before this Court. The senior counsel for the petitioner has vehemently opposed the request of the counsel for DDA. He contends that sufficient opportunity has been given to DDA and in view of the order made on 30th July, 2010 no case for granting any further time is made out. It is contended that the project of construction of the petitioner on the said land has already been delayed for the last over two years causing huge loss and damage to the petitioner and ought not to be permitted to be delayed further. He has further drawn attention to the judgment dated 23rd April, 2004 (supra) in the ACC writ petition recording that by Notification dated 13th November, 1959 under Section 4, certain lands in the village were notified for acquisition but without giving the Khasra Nos.; that by another Notification dated 19th November, 1968 also under Section 4 of the Act published in the Delhi Gazette of 16th January, 1969 the lands in Khasra No 231-238 were again notified for acquisition; however, the said lands were de-notified vide Notification dated 23rd April, 1969 published in the Delhi Gazette of 15th May, 1969; that notwithstanding the land being de-notified for acquisition, the LAC on 19th September, 1986 had made an award with

respect to Khasra No. 231 to 238 also.

7. The Division Bench found that no Notification under Section 6 of the Act with respect to the land in Khasra No. 231 to 238 had been shown and there could be no award in the absence of the Notification under Section 6. Accordingly, the writ petition was allowed and the award dated 19th September, 1986 qua the land in Khasra No. 231 to 238 was quashed.

8. The senior counsel for the petitioner next invites attention to the counter affidavit filed by DDA in the present proceedings and in which it is the plea of the DDA that:

- i) qua Khasra No. 230 (0-18) Notification under Section 4 dated 10th November, 1960 and Notification under Section 6 dated 30th January, 1964 were issued but no award was made;
- ii) qua Khasra No. 231(3-15), 232(0-3), 233(1-18), 234(5-5), 235(3-5), 236(0-5), 237(3-14), 238(3-1) it is pleaded that Notification under Section 4 dated 19th November, 1968 and Notification under Section 6 dated 19th November, 1968 were issued and the award dated 19th September, 1986 (supra) was published and the possession was handed over to DDA on 22nd September, 1986;
- iii) with respect to Khasra No. 239/1 (0-19), 239/2 (2-6) it is pleaded that Notifications under Section 4 dated 19th

November, 1968 and under Section 6 also dated 19th November, 1968 were issued but no award was made;

- iv) with respect to Khasra No. 240/1(1-4), 240/1/1(0-8), 240/2(2-8) it is pleaded that Section 4 Notification dated 16th March, 1962 and Section 6 notification dated 18th June, 1963 were issued but out of which only Khasra No. 240/1/1(0-8) was acquired by Award No. 1821 dated 26th April, 1965 but possession has not been given to the DDA;
- v) with respect to Khasra No. 240/1 and 240/2 it is pleaded that no award has been made;
- vi) lastly with respect to Khasra No. 231(3-15), 232(0-3), 233(1-18), 234(5-5), 235(3-5), 236(0-5), 237(3-14), 238(3-1) it is pleaded that the same had been acquired by award dated 19th September, 1986(supra).

The senior counsel for the petitioner thus contends that the award dated 19th September, 1986 relied upon by the DDA in the counter affidavit in the present case was the award in the earlier writ petitions and which was quashed qua Khasra No. 231 to 238 and no reliance can be placed thereon.

9. It would thus be seen that out of the Khasra Nos.230,231-238,239 & 240 subject matter of this petition:

- i) award with respect to Khasra No. 231 to 238 has been the subject matter of the earlier writ petitions aforesaid;

- ii) as far as Khasra No. 230 is concerned according to the counter affidavit of the DDA also though with respect to part of it Sections 4 and 6 Notifications were issued but no award was made;
- iii) similarly with respect to Khasra No. 239 also the stand of the DDA is that though with respect to part of it Sections 4 and 6 Notification were issued but no award was made;
- iv) that leaves Khasra No. 240. With respect to the said Khasra also the stand is that only the land admeasuring 8 biswas in Khasra No. 240/1/1 was acquired but possession not given to the DDA. The DDA thus is not concerned with the Khasra No. 240 also.

10. DDA claims only with respect to Khasra No. 231 to 238 that the land was acquired and vested in it but the award with respect to the said land was quashed in the judgments (supra).

11. The counsel for the DDA has, with respect to Khasra No. 231 to 238, contended that first Section 4 Notification dated 13th November, 1959 was issued followed by another Section 4 Notification dated 19th November, 1968. It is argued that Section 6 Notification dated 6th January, 1969 which has been handed over today was in pursuance of Section 4 Notification dated 13th November, 1959. It is stated that the de-notification of 23rd April,

1969 was of Section 4 Notification dated 19th November, 1968 inasmuch as Section 4 Notification dated 13th November, 1959 with respect to the same land existed. It is argued that the award dated 19th September, 1986 was in pursuance of Section 4 Notification dated 13th November, 1959 and Section 6 Notification dated 6th January, 1969 handed today. The purport of the said argument of the counsel for DDA is that the Division Bench in the judgment aforesaid wrongly concluded that there was no Section 6 Notification inasmuch as Section 6 Notification now produced of 6th January, 1969 was made.

12. The judgment aforesaid of the Division Bench has attained finality. It is now not open to the DDA to contend in these proceedings that the said judgment is wrong or that the award which was quashed with respect to the land in Khasra No. 231 to 238 is valid.

13. The Supreme Court in *V.S. Charati Vs. Hussein Nhanu Jamadar* (1999) 1 SCC 273 held that a decision, simply because it may be wrong would not there upon become a nullity; it would continue to bind the parties unless set aside. Similarly, in *Mathura Prasad Bajoo Jaiswal Vs. Dossibai N.B. 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 land was acquired or not is a mixed question of law and fact and the decision in the earlier writ petitions between the predecessor-in-interest of the petitioner and the respondent DDA would bind the DDA. This Court also in ***Subhash Juneja Vs. 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 same.

14. It is for this reason that it has not been deemed appropriate to grant any further time to the DDA inasmuch as it is felt that no purpose would be served therefrom.

15. Accordingly, the plea of DDA of the land subject matter of the petition having been acquired and vested in it, cannot be sustained and DDA is held not entitled to object to the application of the petitioner to the respondent MCD for sanction of plans for construction on the said property. Axiomatically, the communications of DDA to the MCD and other authorities claiming title to the land are also quashed.

16. The petitioner has also claimed the relief of declaration that the claim of the respondent DDA of having been put into possession of the land is

bad. The counsel for the respondent DDA has opposed the said claim of the petitioner. It is contended that even if acquisition be held to be bad, the same would not affect the possession of DDA and the declaration as claimed by the petitioner in this writ petition qua possession cannot be granted and the petitioner if entitled to possession is required to institute a suit for recovery of possession of land from the respondent DDA.

17. The senior counsel for the petitioner has drawn attention to the interim orders in the earlier writ petitions whereby DDA was restrained from dispossessing the petitioner from the land. Attention is also invited to para 12 of the final judgment in the ACC writ petition where the Division Bench held that no material had been brought on record by the respondents therein to controvert the averment of ACC that they continue to be in possession of the subject land. It is further contended that the said position was not varied in the judgment in the other writ petition i.e. filed by DSCA in which DDA was a party.

18. The counsel for the DDA has rejoined by contending that the interim orders aforesaid were after the Notification of 6th October, 1986 vesting of the said land by LAC in the DDA and after 22nd September, 1986 when the actual possession of the land was handed over by the LAC to DDA. Copies of the Notification dated 6th October, 1986 and 'Kabza Karyawahi' of 22nd September, 1986 are handed over.

19. I have inquired from the counsel as to the nature of the land. I have been informed that it is open land with a boundary wall. The senior counsel for the petitioner however contends that there is a built up portion also on the said land. The principle of law with respect to possession of open land was discussed by the undersigned in *Smt. Ishmali Devi Vs. DDA* MANU/DE/1838/2009. It was found that the possession of open land is deemed to be of the rightful owner thereof inasmuch as it is very difficult to determine as to who is in possession of open land. On the said principle, notwithstanding the Notification and the 'Kabza Karyawahi' aforesaid, once the petitioner is found to be the owner of the land, the possession thereof has to be held to be of the petitioner. The DDA has not placed any material to rebut the said presumption. Even otherwise I find that the claim of DDA of being put in possession of the land is only on the basis of the award dated 19th September, 1986 of acquisition of the land; but that award has since been declared as bad. Once the award is held to be bad, all proceedings in pursuance thereto including the Notification dated 6th October, 1986 and 'Kabza Karyawahi' of 22nd September, 1986 would go with the award. DDA in its counter affidavit has nowhere stated that after being put into possession, has carried out any work or activity on it. It is common knowledge that possession of such lands pursuant to acquisition is notional. In fact, there is another writ petition pending before this court in which DDA is unable to explain possession of at least 15000 acres of land in

Delhi which was vested in it pursuant to acquisition. In these circumstances, the plea of DDA with respect to possession cannot be accepted and the petitioner is found entitled to relief with respect thereto also.

20. I am also of the opinion that an agency of the State, as DDA is, ought not to take such litigious and dishonest pleas. Once the claim of DDA of title to land on basis of award dated 19th September, 1986 was not upheld, DDA ought not to take a plea that the petitioner should sue for possession. The State should not unnecessarily litigate with its citizens. The Supreme Court recently in *Urban Improvement Trust, Bikaner Vs. Mohan Lal* 2010 (1) SCC 512 reiterated that Statutory Authorities ought not to raise frivolous and unjust objections, nor act in a callous and high handed manner and cannot behave like some private litigants. It was further held that such bodies are expected to restitute/restore the wrongs committed, upon being found so without requiring unwarranted litigation for the same.

21. Accordingly, it is further declared that the claim of DDA of possession of land is bad and the Notifications dated 6th October, 1986 and 'Kabza Karyawahi' of 22nd September, 1986 being contrary to the award dated 19th September, 1986 are also set aside.

22. Axiomatically, the respondent MCD which was not considering the application of the petitioner for development/construction on the land owing

only to the objection of DDA is directed to consider the same in accordance with law.

23. The petition is allowed with aforesaid directions. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**17th September, 2010
M.**