

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

Date of decision: 12th July, 2011

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W.P.(C) 465/2011

BHARTI REALTY LTD.

..... Petitioner

Through: Mr. V.P. Singh & Mr. Aashish
Gupta, Adv.

Versus

**DELHI POLLUTION CONTROL
COMMITTEE**

.... Respondents

Through: C. Mohan Rao, Mr. Lokesh Sharma,
Adv. along with Mr. Dinesh Jindal,
Law Officer, DPCC.

AND

W.P.(C) 1041/2011

LODHI PROPERTY CO. LTD.

..... Petitioner

Through: Mr. B.B. Gupta with Harsh Hari
Haran & Mr. Umesh Aggarwal,
Adv.

Versus

**DELHI POLLUTION CONTROL
COMMITTEE**

.... Respondents

Through: C. Mohan Rao, Mr. Lokesh Sharma,
Adv. along with Mr. Dinesh Jindal,
Law Officer, DPCC.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Not necessary
2. To be referred to the reporter or not? Not necessary
3. Whether the judgment should be reported in the Digest? Not necessary

RAJIV SAHAI ENDLAW, J.

1. The petitioner in W.P.(C)465/2011 acquired Plot No.1 Shopping Mall, Vasant Kunj, New Delhi from the DDA and after obtaining *inter alia* Environment Clearance dated 28th November, 2006 from the Ministry of Environment & Forests has raised construction of its corporate office thereon. The writ petition has been filed impugning the order dated 31st October, 2008 of the respondent Delhi Pollution Control Committee (DPCC) directing the petitioner to pay Environmental Damages of 0.5% of the total project cost of ₹90 crores and to furnish a Bank Guarantee, also of 0.5% of the total project cost of ₹90 crores, valid for three years. Though the petitioner had in compliance of the said order paid the damages of ₹45 lacs and furnished the Bank Guarantee for ₹45 lacs but this writ

petition has been filed seeking refund of the said ₹45 lacs and return of the Bank Guarantee, owing to this Court in ***Splendor Landbase Ltd. v. Delhi Pollution Control Committee*** 173 (2010) DLT 52 having held that the respondent DPCC is not empowered to levy such damages and/or to demand such Bank Guarantee.

2. The petitioner in W.P.(C)1041/2011 is a Developer of a hotel at Plot No.27, Lodhi Road, New Delhi and similar damages of ₹2 crores were levied on it also vide order dated 6th February, 2008 which were paid. Buoyed by the judgment of this Court in ***Splendor*** (supra), the writ petition claiming refund of ₹2 crores has been filed. Though the Bank Guarantee was also obtained from the said petitioner but the same has since been returned.

3. Notices of both the petitions were issued. Pleadings were completed in W.P.(C)465/2011. The counsel for the respondent DPCC has in the course of hearing filed the counter affidavit in W.P.(C)1041/2011 also.

4. The counsels for the petitioners have contended that they are similarly situated as the petitioner in *Splendor* and other connected petitions and the same order ought to follow.

5. The counsel for the respondent DPCC has at the outset stated that the respondent DPCC has preferred an intra court appeal against the judgment of the Single Judge in *Splendor* and other connected petitions and which is listed next before the Division Bench on 24th August, 2011. It was argued that the present petitions be adjourned till the decision of the appeal aforesaid.

6. However the aforesaid contention of the counsel for the respondent DPCC was not accepted. I am of the view that no purpose would be served by keeping these petitions pending. It is deemed expedient that the Division Bench considers all matters, from all facets and hears all counsels in one go rather than in stages. The same is also necessary to avoid multiplicity of litigation on the same issues. It was thus put to the counsel for the respondent DPCC as to why not the present petitions be also allowed and the respondent DPCC prefers intra court appeals in these cases

also so that the same can be heard on 24th August, 2011 along with appeals in ***Splendor*** and in other connected writ petitions.

7. The counsel for the respondent DPCC has then argued:-

- a. that the judgment in ***Splendor*** would not bind the present cases as the same is *per incuriam* for not considering ***Indian Council for Enviro-Legal Action v. Union of India*** (1996) 3 SCC 212. Attention is invited to para 60 of the said judgment laying down that the Central Govt. is empowered under the Environment Protection Act, 1986 to take all measures as it deems necessary or expedient to protect and improve the quality of environment, including imposition of costs, remedial measures on the offending industry. It is contended that the provisions of the Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981 whereunder damages subject matter of these petitions were imposed are in *pari materia* to the provisions of Environment Protection Act, 1986 and thus the

power to levy damages and demand Bank Guarantee is to be read under Water & Air Acts also. It is contended that all the judgments of the Apex Court relied upon in *Splendor* relate to taxation and are not applicable to matters as concerned. It is further contended that Article 265 of the Constitution does not apply to levy of damages for violation of statutory provisions. It is argued that thus this Bench should re-look into the matter;

- b. It is contended that in *Splendor* and other connected petitions, the challenge was to the show cause notice and in none of those cases any payments had been made or Bank Guarantee furnished. It is argued that in both these petitions the petitioners have already complied with the demand of the respondent DPCC and cannot be permitted to challenge the same now or to seek refund. It is further argued that while the petitioner in W.P.(C)465/2011 had made payment without prejudice to its rights and contentions, the petitioner in W.P.(C)1041/2011 volunteered to deposit the amounts to

avoid closure and cannot now seek refund. It is urged that both the petitioners as businessmen took a business decision to make the payment instead of facing prosecution and closure and cannot be now permitted to reprobate;

- c. It is contended that no refund can be claimed by way of writ petition, especially when the judgment on the basis of which the claim for refund is stated to have arisen has not attained finality as yet;
- d. Attention is invited to a judgment dated 6th July, 2011 in W.P.(C)202/1995, titled ***Lafarge Umiam Mining Pvt. Ltd. v. T.N. Godavarman Thirumulpad*** of the Apex Court observing that penalty can be imposed on polluters;
- e. Principles of waiver, acquiescence and estoppel are invoked to contend that the same deprive the petitioners from any relief. Attention is also invited to judgment dated 16th January, 2009 of this Court in W.P.(C) 7516/2007 titled ***Regent Automobiles Pvt. Ltd. v. Govt. of NCT of Delhi*** and other connected writ

petitions observing that in a given case the Commissioner in exercise of powers under the Delhi Common Effluent Treatment Plants Act, 2000 may not deem it appropriate to take the extreme steps of closing down the unit but may issue specific directions and as a measure to ensure compliance, require furnishing of a Bank Guarantee;

- f. It is contended that the damages levied in both cases are fair and the petitioners having taken advantage thereof by warding off any other action against themselves, are now not entitled to maintain this petition.

8. Per contra, the counsels for the petitioners have contended:-

- (i) That the respondent DPCC cannot withhold the monies which the judgment in *Splendor* holds the respondent DPCC to be not entitled to;
- (ii) That the property of the petitioner in W.P.(C)465/2011 is situated in the close vicinity of the property subject matter of *Splendor*;

- (iii) Reliance is placed on *Mafatlal Industries Ltd. v. Union of India* (1997) 5 SCC 536 on the aspect of powers of this Court to direct refund of the amounts wrongly collected;
- (iv) That the judgment in *Regent Automobiles* (supra) has been considered in *Splendor*;
- (v) That the amounts collected from the petitioners have not been taken as Environmental Damage but as condition of grant of operating licence;
- (vi) That the aforesaid amounts were demanded when the construction was complete and as such the petitioners were left with no option but to pay the amount;
- (vii) That the Supreme Court in *Indian Council for Enviro-Legal Action* (supra) was concerned with Section 3 of the Environment Protection Act and of which there is no equivalent under the Water & Air Act;

- (viii) That in *Splendor* and other connected writ petitions the question of refund did not arise because of the interim protection afforded by this Court in those cases against similar demand as impugned in the present cases;
- (ix) That Supreme Court in *Indian Council for Enviro-Legal Action* had returned a finding of damage to environment having been caused whereas there is no such finding in the present cases. Reference is made to *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715 to contend that the damage has to be ascertained and which has not been ascertained in the present cases and to *Deepak Nitrite Ltd. v. State of Gujarat* (2004) 6 SCC 402 to contend that there is no basis for levy of damages at 0.5% of the project cost;
- (x) Reliance is placed on *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* 109 (2004) DLT 415 to contend that refund under Article 226 can be directed in matters other than tax also;

(xi) It is contended that the payments being under coercion and protest and being in pursuance to an illegal order, no question of estoppel arises.

9. Propriety demands that all the aforesaid contentions be considered by the Division Bench which is seized of the matter and not by this Bench. The contentions of the counsels have been noticed only to make a record thereof; else, Co-ordinate Benches cannot consider the matter when the same is pending consideration in appeal.

10. However it falls for consideration by this Bench, whether owing to the petitioners having already made the payments and furnished the Bank Guarantee demanded and having not considered the need to challenge the same and having preferred these petitions only after the judgment in *Splendor*, disentitles the petitioners from maintaining these petitions.

11. The conduct of the petitioners does show that the petitioners at the contemporaneous time were satisfied with the demand and readily complied with the same. Even though the petitioner Bharti Realty Ltd. made payment without prejudice, it did not immediately thereafter also

make any challenge. However one cannot also lose sight of the fact that the said law is still at its nascent stage; there are no precedents, no past practices. The petitioners thus could not be expected to know whether the respondent DPCC was entitled to levy such damages or demand Bank Guarantee. For a person to relinquish a right or claim, he must know the same; a person cannot relinquish what he does not know he has. This is not a case of ignorance of law. Even the Courts are still grappling with as to what is the law in this regard. I am thus unable to hold that the petitioners are disentitled from preferring these petitions or from claiming the reliefs claimed for the reason of having accepted the demand. It cannot also be lost sight of that the projects of the petitioners were at crucial stage then with the petitioners having sunk in money and efforts in development also besides the cost of the land. The Apex Court in *National Insurance Co. Ltd. v. Boghara Polyfab Private Ltd.* (2009) 1 SCC 267 has held that whether a case of coercion is made out is a question of fact and dependent upon several factors. The present, for the reasons aforesaid, is a case of petitioners being coerced into making the payments and furnishing the

Bank Guarantee, which this Court has held the respondent DPCC to be not entitled to seek.

12. The respondent DPCC cannot also be so allowed to illegally enrich itself, if not entitled in law to the monies. The orders/demands impugned in this petition, as per judgment in *Splendor* were beyond the jurisdiction of respondent DPCC and thus *non est*. No benefit of such a void demand/order can be retained by the respondent DPCC which is “State” within the meaning of Article 12 of the Constitution of India.

13. I am otherwise also of the opinion that if the petitioners have violated the Air & Water Acts, then they ought to face the consequences thereof as follow in law and cannot buy their way out of the said consequences. To hold, the respondent DPCC entitled to retain the monies, tantamounts to holding that the respondent DPCC would not be entitled to take any other action which it may be entitled in law to take against the petitioners for violations if any committed by the petitioners. The same cannot be permitted.

14. The next question which arises is, of the relief to be granted. This Court in *Splendor* and in other connected writ petitions was not concerned with the question of refund. The question of entitlement of the petitioners to interest also arises.

15. I am of the view that the petitioners cannot be held entitled to any interest. The petitioners even though without prejudice, chose to comply with the demand rather than challenge the same at the contemporaneous/relevant time. These petitions have also been filed after considerable time (though within three years of the payment); in such situation, the petitioners cannot be entitled to any interest.

16. If the petitioners are to be held entitled to refund of the amounts paid, liberty has to be necessarily granted to the respondent DPCC to proceed afresh against the petitioners for the violations if any committed by the petitioners. This Court in *Splendor* and other connected petitions also left it open to the respondent DPCC to take action in accordance with law.

17. The petitions are therefore allowed with the following directions:-

- A. The respondent DPCC to within six weeks of today refund to each of the petitioners the amounts aforesaid collected from them and to also within the said time release the Bank Guarantee obtained from the petitioner in W.P.(C)465/2011;
- B. Upon failure to refund/release within the time aforesaid, the respondent DPCC shall be liable for interest at 10% per annum on the amounts and on the value of Bank Guarantee, from the expiry of six weeks herefrom and till the date of refund/discharge;
- C. The respondent DPCC is also granted liberty to proceed in accordance with law for the violations/breaches if any committed by the petitioners. It is made clear that such actions to be taken by the respondent DPCC shall not be defeated for the reason of delay in initiating the same since the respondent DPCC had withheld the said actions owing to

the petitioners at the contemporaneous time having made the payment/given the Bank Guarantee.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

JULY 12, 2011

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(corrected and released on 28th July, 2011).