

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

Date of decision: 4th April, 2011

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W.P.(C) 1862/2011

KANHAYA LAL MADAN

..... Petitioner

Through: Mr. Arvind Nayar & Mr.
Shubhanshu Singh, Advocates

Versus

NEW DELHI MUNICIPAL COUNCIL & ANR. Respondents

Through: Mr. Manoj K. Singh with Mr.
Nilava Banerjee & Mr. Parag
Malhotra, Advocates for R-1.
Mr. Neeraj Chaudhari, Adv. for R-2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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 writ petition seeks mandamus to the respondent NDMC to refund to the petitioner along with interest of misuse / damage charges, conversion charges and other charges levied and deposited by the petitioner for obtaining freehold conversion of his property; refund is

sought on the ground of the said recoveries being illegal, arbitrary, wrong, unjust and against the Office Order, Rules and Policy; relief of restraining the NDMC from taking any action against the petitioner with respect to unauthorized construction / misuse in the property of the petitioner is also claimed; yet another relief claimed is to provide standard plan in accordance with Master Plan for Delhi–2021 to enable the petitioner to get additional FAR.

2. This writ petition came up first before this Court on 21st March, 2011 when doubts were raised as to the maintainability of the petition. On request of counsel for the petitioner, the matter was adjourned.

3. Since the primary relief claimed in the petition is of refund, it was enquired as to how a writ petition claiming such refund is maintainable. The counsel for the petitioner has placed reliance on ***U.P. Pollution Control Board Vs. M/s Kanoria Industrial Ltd.*** (2001) 2 SCC 549 and on ***Salonah Tea Company Ltd. Vs. Superintendent of Taxes Nowgong*** AIR 1990 SC 772. The Supreme Court in ***U.P. Pollution Control Board***

(supra) after consideration of several earlier judgments including in *Salonah Tea Company Ltd.* (supra) held that a writ petition can be entertained where the claim is made only for refund of money consequent upon declaration of law that levy and collection of tax / cess is unconstitutional or without the authority of law, though such power is to be exercised sparingly depending upon the facts and circumstances of each case. It was held that where facts are not in dispute and collection of money as cess was itself without the authority of law and the amount was paid under protest and the writ petitions are filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional, relief of refund can be granted.

4. As far as the facts of the present case are concerned, the demand for the amounts of which refund is claimed by way of this petition was raised on the petitioner vide notice dated 12th March, 2009 of the respondent NDMC. The petitioner though claims to have been earlier controverting the right of the respondent NDMC to levy misuse charges etc., did not protest at all after the said letter dated 12th March, 2009. On the contrary,

the petitioner unequivocally and unconditionally deposited part of the amount with the respondent NDMC on 13th April, 2009. The petitioner further claims to have on the same day written a letter to the respondent NDMC (though the same does not bear any acknowledgment) in which the petitioner intimated to the respondent NDMC that he had deposited the said amount as demanded and requested for issuance of a Conveyance Deed of freehold rights. He further offered his readiness to pay the balance dues, if any, and sought more time to pay the balance amount. There is no whisper in the said letter of the petitioner having paid the amount under protest or subject to his right of refund if so found due.

5. The petitioner thereafter on 28th April, 2009 deposited the balance amount also, again unconditionally and without any demur. He again claims to have written a letter dated 28th April, 2009 informing the respondent NDMC of deposit of the balance amount in the bank account and again requesting the respondent NDMC to execute the Conveyance Deed of freehold rights. Again there is no mention in the said letter also of

the amount having been paid without prejudice or under protest and or subject to the right of refund.

6. The petitioner thereafter claims to have written another letter dated 3rd July, 2009 in which also there is no mention whatsoever of any protest against the amounts claimed or paid or the same being without prejudice.

7. A Conveyance Deed of freehold rights was executed in favour of the petitioner on 28th June, 2010. It was after six months therefrom, on 16th December, 2010, that the petitioner for the first time claims to have written to the respondent NDMC for refund of the amounts.

8. It would thus be seen that the petitioner in the present case does not satisfy the test laid down by the Supreme Court in ***U.P. Pollution Control Board*** (supra) of the payment having been made under protest. Here the payment atleast after the date of the demand therefor appears to have been made voluntarily and without any demur. In such a situation according to me the writ petition for refund would not lie.

9. I also find that the present is not the type of a case as considered by the Supreme Court in ***U.P. Pollution Control Board***. In all the cases considered in the said judgment, the levy / tax had been declared as *ultra vires* or unconstitutional or illegal. It is in such cases, finding that the State is not entitled to retain the amounts which it was / is not entitled to recover, that directions in writ petitions for refund were made. The present is not such a case. The petitioner was a lessee of land / premises under the respondent / its predecessor. It was the case of the respondent that the petitioner was in breach of terms and conditions of the said lease and in accordance with the terms of the lease, the respondent was entitled to re-enter the premises. Option was given by the respondent to the petitioner to have the breaches regularized on payment of charges. The petitioner accepted the said offer, as aforesaid, without any demur and cannot now be heard otherwise. The case in ***U.P. Pollution Control Board*** and in the judgments discussed therein were of involuntary exaction of tax / cess. The payment here is voluntary. Even if it were to be presumed that the petitioner was, prior to the demand, contesting the computation, the fact

remains that the petitioner thereafter voluntarily made the payment. The petitioner could have at that stage approached this Court. However, the petitioner did not choose to do so and rather opted to, by writing to the respondent that he is agreeable to the demand and shall not protest thereagainst, make the respondent execute Conveyance Deed of freehold rights in the land in favour of the petitioner. The petitioner having so made the respondent change its position, cannot now claim the equitable relief. In fact the petitioner even now is not ready to revert to the position as existing prior to the execution of the said Conveyance Deed. The petitioner though wants refund, is not willing to put the respondents in the same position in which the respondents would have been on the petitioner not paying the monies. This Court, in writ jurisdiction especially, is to balance the rights and cannot give an unfair advantage to the petitioner over the respondent.

10. The writ petition is also not found maintainable for the reason of entailing disputed questions of fact. The entire case of the petitioner rests on it being “mistakenly” inserted in the Lease Deed executed between the

L&DO on the one hand and the father of the petitioner on the other hand as far back as on 11th January, 1983 that the prescribed user of the property was a “Coal Depot”. It is contended that if there was no such mistake, the question of misuse would not arise. Whether there has been a mistake or not cannot be determined in writ jurisdiction. Moreover, no relief for the last nearly 27 years was claimed with respect to the alleged mistake in the Lease Deed.

11. The petitioner primarily rests his case on the Office Notings, of the respondent No.1 NDMC and of the respondent No.2 L&DO being the predecessor-in-interest of the respondent NDMC, which are favourable to the petitioner. However, merely because some of the officials of the respondents made notings favourable to the petitioner would not entitle the petitioner to the relief of refund in this writ petition particularly when the said favourable comments did not find favour with the higher officials of the respondents and who did not agree with the claims of the petitioner. The Apex Court in *Sethi Auto Service Station Vs. DDA* (2009) 1 SCC 180 held that internal notings are not meant for outside exposure and notings in

the file culminate into an executable order affecting the rights of the parties, only when it reaches the final decision making authority in the department, gets his approval and the final order is communicated to the person concerned. Similarly in *Jasbir Singh Chhabra Vs. State of Punjab* (2010) 4 SCC 192, it was held that issues and policy matters which are required to be decided by the Government are dealt with by several functionaries some of whom may record notings on the files favouring a particular person, someone may suggest a particular line of action; however, the final decision is required to be taken by the designated authority keeping in view the larger public interest. The said views were recently approved in *UOI Vs. Vartak Labour Union* JT 2011 (3) SC 110.

12. There are several other disputed questions of fact also which emanate from the petition itself. However, since option is being given to the petitioner to avail of the remedy of the suit, it is not deemed expedient to elaborate on the same.

13. Mention may however be made of *Suganmal Vs. State of Madhya Pradesh* AIR 1965 SC 1740 cited by the counsel for the respondent NDMC. The said judgment also having been considered by the *U.P. Pollution Control Board* need is not felt to discuss the same also. Reference may however be made to the recent judgment of the Apex Court in *Godavari Sugar Mills Ltd. Vs. The State of Maharashtra* (2011) 2 SCC 439 summarizing the law in this regard.

14. The counsel for the petitioner has further argued that at least notice of the petition be issued and a counter affidavit be called from the respondents so that their stand can be known and so that it can be determined whether any disputed questions of fact arise or not.

15. The counsel for the respondent in opposition to the said plea has referred to *A. Hamsaveni Vs. State of Tamil Nadu* (1994) 6 SCC 51 to contend that a writ petition by way of a roving enquiry cannot be permitted. Moreover, once on a reading of the writ petition itself, the petitioner is not found entitled to the relief by way of a writ remedy, the

question of issuing notice does not arise; also while the claim of the petitioner in a suit filed today will be within time, if notice is issued and the petition is ultimately dismissed, the suit also may become barred by time.

16. I therefore do not find the petition for refund of monies in the present case to be maintainable.

17. As far as the other reliefs claimed in the petition are concerned, no blanket stay against the respondents from taking action against the property of the petitioner as sought can be granted. If any action is threatened or taken, the petitioner shall have remedies in law. Similarly, if it is the plea of the petitioner that it is entitled to additional FAR and the unauthorized construction in the property is regularizable, it is open to the petitioner to apply for the same and if the said application is rejected, to prefer an appeal thereagainst and a writ again would not lie. Rather, it appears that the said two prayers have been added merely to have the notice of the petition primarily claiming refund of monies issued.

18. The petition is therefore dismissed with liberty to the petitioner to sue for refund of monies. It is clarified that the observations herein above have been made only to deal with the contentions of the petitioner and qua the maintainability of the petition and shall not affect the claim, if any, made by the petitioner in a suit for refund of monies.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

APRIL 04, 2011
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