

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

Date of decision: 27th April, 2011

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W.P.(C) 2717/2011

AMAN AHUJA

..... Petitioner

Through: Mohd. Sajid & Zafar Sadique.

versus

MCD & ANR.

..... Respondents

Through: Mr. Nawal Kishore Jha, Advocate for MCD in W.P.(C) No.2717, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2730 & 2733/2011 with Mr. K.P. Singh, A.E & Mr. Satish, E.E., MCD.

Mr. Dev. P. Bhardwaj with Ms. Anubha Bhardwaj, Advocates for MCD In W.P.(C) No.2718, 2727, 2728 & 2729/2011.

Mr. Mukesh Gupta, Advocate for MCD in W.P.(C) No.2726, 2730, 2731 & 2723/2011 with Mr. K.P. Singh

AND

W.P.(C) No.2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732 & 2733 all of 2011

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. All these petitions impugn the notices, all dated 13th April, 2011 issued by the respondent MCD notifying that the properties mentioned therein, all situated in Sanjay Nagar, Gulabi Bagh, Delhi are being misused for commercial/industrial purpose and calling upon the owners/occupants of the said properties to stop the misuse within 48 hours failing which they have been threatened that the properties shall be sealed. The notice further states that the same has been issued in pursuance to the orders dated 16th February, 2006/24th March, 2006/11th March, 2008 of the Apex Court in *M.C. Mehta v. Union of India* directing MCD to take sealing action against misusers.

2. The counsels for the respondent MCD appearing on advance notice inform that in pursuance to the said notices the properties subject matter of W.P.(C) No.2722, 2723, 2725, 2727 ,2728 ,2729, 2731, 2733/2011 have already been sealed.

3. It is further informed that the properties subject matter of the W.P.(C) No.2718, 2719,2720,2721,2724& 2730/2011 have stopped the misuse and the owners/occupants thereof have furnished affidavits/undertakings to the respondent MCD to not misuse the properties in future and as such sealing action against them has been dropped.

4. It is further contended by the counsels for the respondent MCD that the action of sealing being in terms of the directions of the Apex Court, this Court should in accordance with the principles laid down by the Division Bench in judgment dated 11th October, 2007 in W.P.(C) No.7109/2007 titled ***T.S.I. Displays P. Ltd. Vs. MCD*** should refrain from entertaining the petitions and the remedy if any of the petitioners is before the Supreme Court only.

5. It is yet further contended by the counsel for the respondent MCD that in the copy of the notice dated 13th April, 2011 filed in W.P.(C) No.2727/2011 the number of the property has been altered from 20 to 20A; it is contended that the petitioner therein has indulged in tampering. The original file of the respondent MCD containing a copy of the notice where the number of the property is shown as 20 and not 20A is shown in the Court.

6. Though the petitioners have challenged the notices aforesaid but have neither in the petition nor during the course of hearing been able to contend that the user of the property which is contended by the respondent MCD to be misuser, is permitted in law.

7. I have enquired from the counsels as to what is prescribed user under the Master Plan/Zonal Plan. The counsels for the respondent MCD have replied that the prescribed user in the locality is 'Residential' on all floors while the properties are being misused for commercial/industrial purpose.

8. The only case of the petitioners is that the governmental agencies including the respondent MCD have over the last 30 years recognized the commercial/industrial use by issuance of various licenses etc. and by collection of taxes at commercial/industrial rates.

9. The sheer length of illegality will not confer any right and there can be no estoppel against the law.

10. It is the settled position of law that merely because the respondent MCD or other governmental agencies owing to admitted commercial/industrial use have levied charges/taxes at the commercial/industrial rate or granted licences controlling the activities admittedly being carried out, would not tantamount to the change of the prescribed use of the locality and would not stop the said agencies from enforcing the use in accordance with law. The Division Bench of this Court in *Rajiv Aggarwal v. New Delhi Municipal Committee* MANU/DE/0425/1987 held that merely because electric supply was charged at commercial rates, cannot convert the illegal user into legal user or even permissible user and it cannot be deemed to be conferring a license

for the illegality. Thus the same cannot form a justification for the petitioners to continue the misuse or to challenge the notices aforesaid.

11. The counsel for the petitioners has next contended that the notice/order of sealing is appealable before the Appellate Tribunal, MCD and this Court in writ petitions preferred with respect to certain other properties in the same locality has protected the existing users of the said properties owing to vacancy in the office of the Presiding Officer of the Appellate Tribunal, MCD and owing to those petitioners being not in a position to approach the Appellate Tribunal by way of appeal against the notices threatening sealing.

12. Though it is correct that owing to the vacancy in the office of the Presiding Officer of the Appellate Tribunal, MCD, this Court in other cases also has been granting interim protection but in all those cases the matter required investigation by the Tribunal and it was owing to the said fact that it was deemed expedient to grant interim protection till the filling up of the vacancy in the Tribunal. However if this Court finds that the petitioners have no case to be tried by the Tribunal, this Court would not grant interim

protection. None can have a relief to which he/she is not entitled to in law, taking advantage of the vacancy aforesaid.

13. The present is a case of such nature. The petitioners have been unable to demonstrate before this Court that under the Master Plan/Zonal Plan the petitioners are entitled to use the properties for commercial/industrial purposes. Though it is correct that in some cases copies of which have been filed by the petitioners interim protection has been granted to the owners/occupants of properties similarly situated as the petitioners herein till hearing of their appeals by the Appellate Tribunal, MCD but there can be no claim to negative equality. Without petitioners herein being able to make out the case of being entitled in law to continue with the use and without the petitioners being able to show that the notices impugned in the petitions suffer from any illegality, and without the petitioners being able to show that there is anything to be tried/adjudicated by the Tribunal, this Court would not perpetuate a misuser merely because without considering all the said facts interim protection has been granted to others.

14. The counsel for the petitioners has lastly contended that since the petitioners have been using the properties for the same purpose for which they are being used today for the last over 30 years, and further since the petitioners have been representing to the authorities for change of prescribed user of the area owing to majority of the properties being put to misuse, the petitioners should be granted reasonable time of six months from today to, if failing in persuading the authorities concerned to change the prescribed user, restore the properties to their permitted use. It is contended that the said time is required to enable the petitioners to make alternative arrangements for their commercial/business purposes and/or for earning their livelihood.

15. The counsels for the respondent MCD also on instructions confirm that the misuse has been existing for the last at least 20 years.

16. In the circumstances, though the petitions are liable to be dismissed, it is deemed expedient to, subject to certain conditions grant reasonable time to the petitioners to stop the misuse and to make alternative arrangements for their business/industry. Time till 30th September, 2011 is

deemed sufficient for the said purpose. On enquiry, the counsel for the petitioners states that all the petitions have been filed by the owners of the respective properties and who are also the occupiers of the properties. The petitioners through counsel undertake to this Court to, till restoring the permitted use of the properties, not alienate, encumber or part with the possession of the properties in any manner whatsoever and not to carry out any works of addition, alteration and construction thereon.

17. The said undertakings of the petitioners through counsel are accepted and the petitioners are ordered to be bound thereby.

18. The counsel for the petitioners has contended that since time as aforesaid is being granted by this Court, the same be made available also to those cases where the properties have already been sealed. The said request is also found to be reasonable. However the properties aforesaid where the misuse has already been stopped and undertakings/affidavits to in future not carry out the misuse have been furnished would not be entitled to the benefit of this order or to again commence misuse of the properties.

19. The petitions are accordingly disposed of with the following directions:-

- a) the petitioners are not found entitled to continue existing use of the properties and owing whereto notices of misuse have been issued by the respondent MCD. The petitions on merits are therefore dismissed;
- b) the petitioners are however, subject to the undertakings aforesaid of the petitioners granted time till 30th September, 2011 to stop the misuse of the properties. However such of the petitioners as aforesaid who have already stopped the misuse and/or who have furnished the undertakings/affidavits to the respondent MCD shall not be entitled to the said benefit and shall not be entitled to re-commence misuse of the properties;
- c) the respondent MCD is directed to, latest by 1600 hours day after tomorrow i.e. 29th April, 2011, de-seal the properties which have already been sealed. Such of the

petitioners shall be entitled to continue the use for the reason whereof the properties were sealed but only till 30th September, 2011 as aforesaid;

- d) notwithstanding the aforesaid the petitioners shall be entitled to continue to make representations to the governmental agencies for changing the prescribed use of the area/locality and if prescribed use is so changed before 30th September, 2011 and the use to which the properties are being put is in accordance with prescribed use the petitioners shall stand relieved from their undertakings;
- e) the petitioners have been warned of consequences of breach of undertakings given to this Court.

20. The counsel for the petitioner in W.P.(C) No.2727/2011 states that there is no dispute as to the identity of the property, while the petitioners claim the number of the property to be 20A, the respondent MCD is claiming the same property to be bearing number 20. He states that the undertakings aforesaid shall apply to the said property also.

No order as to costs.

Dasti under signature of court master.

**RAJIV SAHAI ENDLAW
(JUDGE)**

27th April, 2011
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