

IN THE HIGH COURT OF DELHI AT NEW DELHI

W. P. (C) 18129/2005

Reserved on: July 18, 2011

Decision on: August 8, 2011

VISHWA MITTER THUKRAL

..... Petitioner

Through: Mr. Deepak Khadaria, Advocate.

versus

UNION OF INDIA & ANR.

..... Respondents

Through:

Mr. Rakesh Khanna, Senior Advocate
with Mr. Vinod Kumar, Advocate for
R-2/NDMC.

Mr. Sachin Datta, CGSC with
Mr. Abhimanyu Kumar, Advocates
for R-1/UOI.

CORAM: JUSTICE S. MURALIDHAR

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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? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGEMENT

08.08.2011

1. The Petitioner is the owner of shop-cum-flat No. 137, Sarojini Nagar Market ('SNM'), New Delhi. He filed this writ petition on 15th September 2005 seeking the quashing of a demand dated 24th August 2005 raised by the Land & Development Office ('L&DO') in the Ministry of Urban Development ('MoUD'), Nirman Bhawan, New Delhi, Government of India, calling upon him to pay misuse charges, damage charges for unauthorized construction and ground rent for grant of conversion of the property from lease hold to free hold. The Petitioner further challenges the breach notices dated 2nd June 2004 and 27th August 2005 issued by the L & DO. The Petitioner also seeks a direction to the Respondents to process the Petitioner's application for conversion from leasehold to freehold and execute the necessary

conveyance deed in favour of the Petitioner in respect of the said shop-cum-flat No. 137, SNM, New Delhi.

2. On 22nd September 2005, Mr. Deepak Khadaria, learned counsel for the Petitioner informed the Court that without prejudice to his rights and contentions, he was prepared to pay the amount demanded by way of demand letter dated 24th August 2005 for the conversion to take place. At the next hearing on 3rd October 2005, while directing notice, this Court recorded the fact that a sum of Rs. 1,81,041/- had been brought to the Court by the learned counsel for the Petitioner. The Respondent was restrained from cancelling the lease of the Petitioner on the ground of non-payment of the demand.

3. During the pendency of the writ petition, SNM fell within the jurisdiction of the New Delhi Municipal Council ('NDMC'). Consequently, the Petitioner filed CM No. 9670 of 2006 to implead the NDMC in place of the L & DO. This application was allowed by an order dated 17th November 2006 and the amended memo of parties was taken on record. A statement was made in the Court on 20th May 2008 that NDMC was adopting the counter affidavit already filed by the L & DO. The parties have thereafter filed certain additional documents.

4. The case of the Petitioner is that he was, as a refugee from Pakistan, allotted shop No. 137, SNM, New Delhi measuring 88 sq. yds. on licence basis. He commenced the business of dry cleaning of clothes in the said shop. In September 1959, the Petitioner submitted plans for alteration and for regularization of the flat above the shop. After waiting for about 1½ years, the Petitioner constructed a double storey room in the rear courtyard of the shop in April 1961 as per the plans submitted by him. The Directorate of Estates ('DoE'), Government of India issued a memorandum on 4th April 1961 with regard to the unauthorized construction of the double storey room in which the Petitioner had installed some heavy machinery. The Petitioner replied to the said memorandum on 13th April 1961. Another memorandum was issued by the DoE on 10th May 1961. He was asked to apply to the Executive Engineer in the DoE for approval of his plans. On 27th June 1961, the DoE wrote to the Petitioner informing

him that the tenancy in respect of shop No. 137, SNM had been terminated. The Petitioner represented against the said termination. These representations were turned down by a communication dated 28th May 1962 of the DOE. The Petitioner thereafter continued making representations pointing out that other shop owners in SNM had made similar alterations and additions. Ultimately by a communication dated 20th June 1963, the DoE informed the Petitioner that the notice dated 27th June 1961 terminating the tenancy of the shop in question was “withdrawn and cancelled”. Another letter dated 3rd June 1965 was issued by the DOE stating that the revocation of licence of the shop stood withdrawn. According to the Petitioner, this implied that the constructions made by the Petitioner till that date had been regularized by the DoE.

5. On 19th August 1965, a notice was issued by the DoE to the Petitioner and to several other shop-keepers in the SNM asking to keep the verandah in front of their shops and/or the compound, lane or bye-lane adjacent to the shops clear of encroachments. By a memorandum dated 18th April 1967, the DOE informed the Petitioner of its decision to accept his request for opening doors in the western wall of the shop. The Petitioner was informed that the work was to be done by the Central Public Works Department (‘CPWD’) as ‘deposit work’ at the cost of the allottee and sanction had to be obtained from the NDMC. The Petitioner deposited the sum of Rs. 500/- for the deposit work. According to the Petitioner, the work was thereafter executed by the CPWD with a sanction of the NDMC and two gates alongwith sunshade projection were erected on the first floor of the shop.

6. It is stated that in October 1968, due to short circuit, the drying tumbler in the shop caught fire and windows and plaster of the room were damaged. The Petitioner received a show cause notice on 11th December 1968 to which he replied on 20th December 1968.

7. The Petitioner thereafter narrates the events up to 25th October 1971 when he received notices for unauthorized construction and refuted those notices stating that practically all the allottees of the shop in the SNM had made alterations as per the needs/requirements of the business and further that the construction made by the

Petitioner was prior to 1962 and could not be termed as unauthorized. During the internal emergency declared in 1975 the DOE by a letter dated 15th September 1975 terminated the tenancy. The Petitioner represented against this. Thereafter by letters dated 28/29th April 1978 and 27th July 1978, the shop-cum-flat was restored in favour of the Petitioner. Another representation was given by the Petitioner on 31st July 1978 protesting against the conditions for restoration imposed by the Respondents. This was followed by a letter dated 4th August 1978 from the DoE withdrawing the cancellation letter dated 15th September 1975 unconditionally.

8. The Petitioner states that in December 1978, the Ministry of Works and Housing proposed that ownership rights should be granted to the licencees in SNM on leasehold basis for 99 years on a lump sum payment of Rs. 13,216.21/- being the capitalized value equivalent to 20 years' annual rent of the shop. On 19th February 1979, the Petitioner deposited sums of Rs. 10,800/- and Rs. 6,600/- towards cost of the shop-cum-flat with the DoE. On 31st July 1982, he deposited the ground rent. The deed of conveyance of leasehold was executed by the Respondents in favour of the Petitioner on 15th September 1982 with respect to the shop. A separate lease deed was executed with respect to flat No. 137. By an office order dated 22nd March 1983 issued by the L & DO, the breaches of enclosing the verandah and providing additional doors and windows were condoned.

9. The Petitioner states that the layout plan of SNM was revised in January 1987. The corner shop in the market was permitted to have a 5 ft. wide projection in the form of a public passage on the municipal land. The MoUD in 1992 announced the scheme of conversion from leasehold to freehold. The Petitioner submitted to the NDMC plans proposing to demolish the old structure and carry out new construction. The NDMC directed him to obtain a No Objection Certificate ('NOC') for which he applied to the L&DO. However on 6th August 1992, the L & DO raised a demand in the sum of Rs. 2,47,000/- on account of the misuse charges and damages for unauthorized construction. The misuse was purportedly from 18th January 1983 to 31st March 1993 and the damages from 17th March 1989 to 16th March 1993. The ground rent demanded was from 15th July 1983 to 14th January 1993. The Petitioner on 4th January

1994 protested against the above demand pointing out that the construction carried out prior to 31st December 1962 had been condoned by the DoE by its letter dated 6/9th March 1971. This was followed by representations dated 4th January 1994 and 5th July 1996.

10. On 19th March 2004, the Petitioner applied for conversion of his shop-cum-flat and deposited a sum of Rs. 94,655/- towards conversion fee for the shop and Rs. 29,000/- towards conversion fee for the flat. Although no response was received to the application, he received a breach notice dated 26th May 2004 in respect of the shop and a further breach notice dated 2nd June 2004 in respect of the flat. According to the Petitioner, the alleged breaches pertained to the alterations and constructions made prior to 31st December 1962 which had already been condoned and therefore, the breach notices were without legal basis. The Petitioner was issued a demand letter dated 24th August 2005 again for misuse charges, damages for unauthorized construction and ground rent. This included a sum of Rs. 2,47,000/- which had been demanded earlier on 6th August 1992. Another breach notice was issued on 27th August 2005 regarding alleged unauthorized construction on the first floor in the centre of the courtyard. In the circumstances, the present writ petition was filed.

11. In the reply filed to the petition by the L & DO on 21st July 2006, it is submitted *inter alia* that after conferment of ownership rights in respect of the shop-cum-flat in the name of the Petitioner, the L & DO initiated action for the execution of lease deed and conveyance deed. At that stage, the allottees were required to furnish an existing plan of the premises approved by the architect and verified by the CPWD and duly signed by the allottee. Annexed as Annexure R-1 to the counter affidavit is the plan as submitted by the Petitioner. It was signed by the Petitioner and the architect. It is stated that the lease deed in respect of the shop was executed on 15th September 1982 and in respect of the flat was executed on 5th August 1986. Copies of the said deeds have been enclosed with the reply. The L & DO stated that when the flat was inspected on 17th March 1989, it was observed that the kitchen and bath has been used as a commercial godown for readymade garments. The inspection carried out on 17th July

1990, 28th December 1993 and 26th March 2004 indicated that the flat had been used for commercial purpose and unauthorized constructions had also continued. As regards the shop, the inspection carried out on 2nd April 1982, 17th March 1989 and 26th March 2004 revealed that the Petitioner had carried out unauthorized construction in the rear courtyard without the approval of the lessor and the local body and also enclosed the common verandah and merged the same with the shop in violation of the terms of the lease deed and conveyance deed. The Petitioner was issued show cause notices dated 12th March 1983, 28th July 1983, 27th June 1991 and 26th May 2004. By a letter dated 28th July 2005, the Petitioner informed the L & DO that he was willing to pay the charges. They were conveyed to him on 24th August 2005. Reference is made to the modified conversion scheme of 2003 under which conversion would be granted even if there was unauthorized construction subject to payment of damage charges whether earlier demanded or not. Further, the applicant would be liable for action under the bye-laws. In respect of those properties where any amount earlier demanded was not paid, such amount would have to be paid by the lessee before the application for conversion could be considered.

12. A detailed rejoinder was filed by the Petitioner on 7th November 2006. The Petitioner placed reliance on office order No. 7/83 issued by the L & DO on 22nd March 1983 condoning the breaches for use of top floor of the shop for commercial purpose even if the plans sanctioned indicated that they were for residential purposes.

13. The Petitioner filed an application, i.e. CM No. 12625/2010, in which he pointed out that during the pendency of the writ petition, NDMC had issued notices to the flat owners in SNM demanding conversion charges of Rs. 17 lakhs for conversion of property from residential to commercial use. The Petitioner wrote to the Respondent on 29th June 2010 pointing out that he had already filed an application for conversion with the L & DO and the conversion charges claimed by the L & DO had been already deposited by the Petitioner. The Petitioner stated that he also wrote another letter with the same effect on 23rd July 2010. On 9th August 2010, when the NDMC officials sought to seal the premises, the Petitioner was compelled to deposit a sum of Rs. 17,77,198/- without prejudice to his rights and contentions and under protest. A

direction was accordingly sought by the Petitioner in the said application that in the event of his succeeding in the writ petition, the NDMC should return the said amount to him with interest. Notices were directed to issue in the said application on 19th October 2010. In the reply to the said application, the NDMC referred to the visit by the Monitoring Committee ('MC') appointed by the Supreme Court to the SNM on 6th January 2009. Three of the flats in SNM were sealed under the directions of the MC for misuse of the property and converting the use of the flats from residential to commercial. The other shopkeepers then requested the MC not to take any action on the assurance that they would stop using the premises for commercial purposes and would also make a formal application for change of land use. It was then decided that the shopkeepers who were interested in conversion of the use of their flats for commercial purposes, may apply to the NDMC before 21st January 2009. The decision of the Lt. Governor ('LG') on the representation of the shopkeepers directing that the residential value had to be subtracted from the conversion charges was conveyed to the NDMC by the Principal Secretary to the LG on 2nd February 2009. A distinction was drawn by the NDMC between the request for conversion from lease hold to free hold and change of use from residential to commercial. The NDMC pointed out that some of the traders in SNM had approached the Supreme Court and filed IA No. 2473 of 2010 for stay of the decision of the MC. On 31st May 2010, the Supreme Court dismissed the said IA. Thereafter the Petitioner himself deposited the conversion charges for conversion from residential to commercial to avoid the sealing action.

14. In a rejoinder filed to the above reply the Petitioner *inter alia* referred to clause 5.1 of the MPD-2021 which states that any commercial activity existing prior to 1962 in residential area is permitted and that the NDMC could not charge either misuse or conversion charges in respect thereof. The Petitioner on 11th February 2011 also filed a copy of a letter dated 1st December 1978 addressed by the DOE to the Chairman of the SNM traders' association requiring that the shop owners should submit a plan prepared by a registered architect.

15. At the hearing on 7th April 2011, this Court passed the following order:-

“1. The submission of Mr. Deepak Khadaria, learned counsel

appearing for the Petitioner is that the controversy has narrowed down to the date on which the unauthorised constructions took place. According to the Petitioner the unauthorised constructions existed even prior to 1962 as is evident from the memoranda dated 4th April 1961 and 18th April 1967 and the other documents placed on record by the Petitioner. In particular, he refers to a communication dated 6th/9th May 1970 which states that the Directorate of Estates “has decided to overlook constructions carried out by the shopkeepers of Sarojini Nagar Market upto 31st December 1962. However, any constructions etc. carried out by the shopkeepers after the aforesaid date will be dealt with by the NDMC under their Bye-laws.”

2. According to Mr. Khadaria the site plan dated 14th December 1978, a copy of which is at page 193 (Annexure R-1) as well as at page 350 (Annexure A-1) was submitted to the L&DO and it showed the existence of the unauthorised constructions, including three openings on the ground floor of the said shop. This he says was submitted pursuant to a letter dated 1st December 1978 from the Ministry of Works and Housing, Government of India to the Chairman of the Sarojini Nagar Market Shopkeepers Association requiring each shopkeeper to submit the measurements of each of the existing super-structures as indicated in para B of that letter. According to him, notwithstanding the aforementioned site plan, each shopkeeper was compelled to submit a ‘standard’ site plan at the time of execution of the lease deed. A copy of the said standard plan (page No. 97 of the paper book), which was verified by the L&DO officials on 5th May 1982, does not show the unauthorised constructions.

3. Mr. Vinod Kumar, learned counsel appearing for the NDMC produces a colour photocopy of the site plan dated 5th May 1982. He states that the NDMC will have to seek verification from the L&DO as to how an earlier plan dated 14th December 1978 shows the unauthorised constructions. It is also stated that the NDMC has sought from the L&DO records prior to 1982.”

16. Thereafter the NDMC and the Petitioner have filed further documents and affidavits.

17. Mr. Deepak Khadaria, learned counsel appearing for the Petitioner submitted that the demand for charges for misuse and unauthorized construction raised by the L &

DO by the impugned letter dated 24th April 2005 was unjustified. According to him, all the constructions took place prior to 31st December 1962 and in terms of clause 5.1 of the MPD-2021, no demand could be raised for misuse charges or damages in respect thereof. His submission is that the plan submitted to the L & DO on 14th December 1978 at the time of applying for execution of the conveyance deed was drawn up in terms of the instructions of the DoE. This plan showed the unauthorized constructions. On the other hand, the standard plan which was prepared and signed by the L & DO officials as well as the Petitioner on 5th May 1982 did not show the unauthorized constructions although they existed even prior to that date. According to him, this anomaly arose on account of the fact that the shopkeepers were, at the time of execution of the conveyance deed in 1982, compelled to furnish such a 'standard plan'. Interestingly, the L & DO maintains that even the plan submitted on 14th December 1978 does not reflect any unauthorized construction. The affidavit of the NDMC in reply to the application in CM No. 12625/2010 also maintains that the plan submitted by the Petitioner in 1978 does not show unauthorized construction.

18. At the hearing on 18th July 2011, Mr. Rakesh Khanna, learned Senior counsel appearing for the NDMC produced before the Court a whole set of documents which were copies from the file of the house tax department of the NDMC. It is submitted that the record in respect of the property in question was transferred to the NDMC only on February 2009 and no records prior to 1981 had been received from the L & DO despite efforts. However, the records in respect of the house tax of the property were throughout maintained by the NDMC. These showed when exactly the unauthorized constructions were raised and whether they were at any time removed by the Petitioner himself. An additional affidavit dated 16th July 2011 by the NDMC was tendered in the Court enclosing the said documents.

19. The position that emerges from the house tax documents is that in a notice dated 18th May 1968 issued by the NDMC to the Petitioner, it was stated that the assessment of the house tax on the "additional portion of the shop and flat No. 137, Sarojini Nagar Market, New Delhi has been finally settled after enquiry..." . In the survey report of 1975-76, it was noted that "the additional coverage of 192 sq. ft. has been removed in

September 1975”. It appears that the Petitioner in fact wrote to the NDMC on 26th July 1976 stating that his house tax bill should be modified “as there is no additional portion in the Flat, which fact can be verified from the dealing section of the N.D.M.C., and for which the House Tax has been levied”.

20. It was urged by Mr. Deepak Khadaria, learned counsel for the Petitioner, that the above documents show that the additional construction which existed prior to 31st December 1962 had been removed. He sought to explain that the Petitioner’s statement in his letter dated 26th July 1976 that “there is no additional portion” did not refer to the additions made prior to 31st December 1962. However, this Court finds this explanation not convincing. On a collective reading of the NDMC letter dated 18th May 1968, its survey report for the year 1975-76 and the Petitioner’s letter dated 26th July 1976 the position that emerges is that whatever additional construction made prior thereto including those that existed prior to 1963 were in fact removed by the Petitioner some time in 1975-76. There is no occasion to doubt the authenticity of these documents in the house tax file of the NDMC. The original record of house tax has been produced before this Court. The report of the inspection on 23rd August 1976 records that “the additional area in flat has since been removed by the owner and as such if approved, the assessment for the additional area in the flat stood Rs. 557 lakhs 10% be excluded from the house tax assessment list with effect from 1st September 1976....”. There can be no doubt that the Petitioner had by then removed the additional construction. In the report dated 23rd December 1983, it is noted that in the recent inspection by the staff of the house tax department, coverage of 192 sq. ft. approx. with shed was found in the back of the shop and another shed of 120 sq. ft. in the courtyard of the flat No. 137. This is consistent with the case of the NDMC that fresh constructions were raised after the conveyance deed was executed. This is consistent with the stand of the NDMC that the plan submitted on 5th May 1982 did not therefore reflect the additional constructions which came up subsequently. The above documents contradict the case of the Petitioner about the constructions in the property which were raised prior to 31st December 1962 continuing throughout. Thus the main plank of the Petitioner’s case about the unauthorised constructions referred to in the impugned breach notices being an old one prior to 1963 is not supported by the record. The decision of this Court

dated 13th October 2004 in W.P. (C) No. 6649 of 2002 (*Nehchal Singh Sandhu v. NDMC*) on which considerable reliance was placed by Mr. Khadaria is on facts distinguishable and does not help the case of the Petitioner. The impugned demand notice dated 24th August 2005 and the breach notices dated 2nd June 2004 and 27th August 2005 do not call for interference.

21. There is merit in the submissions of the NDMC that the issue of conversion of the property in question from leasehold to freehold should not be confused with change of use from residential to commercial. The Petitioner has admittedly paid the charges both for conversion in respect of the shop and flat and also for the change of use in respect of the flat from residential to commercial. On this score therefore the NDMC will not hereafter raise any fresh demand. Consequently, there is no case made out for any refund of any amount by the NDMC to the Petitioner. However, subject to fulfillment of any other conditions in accordance with applicable rules and regulations of the NDMC, which will be no different from the conditions imposed on other shopkeepers in SNM, the NDMC is directed to issue the necessary orders confirming the grant of conversion from leasehold to freehold and granting approval for change of use from residential to commercial in respect of the property in question in favour of the Petitioner within a period of eight weeks from today.

22. The writ petition is disposed of with the above directions.

S. MURALIDHAR, J

AUGUST 8, 2011
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