

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

Date of decision: 12th August, 2011

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W.P.(C) 23301/2005

M/S KAPUR BROTHERS

..... Petitioner

Through: Mr. Sumit Bansal, Mr. Ateev Mathur & Mr. Ajay Monga, Adv.

Versus

D.D.A. & ORS.

..... Respondents

Through: Mr. Shobhana Takiar, Adv. DDA.
Mr. Vinay Sabharwal & Ms. Neha Sabharwal, Adv. for R-3.
Mr. Harpreet Singh, Adv. for R-4.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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 counsel for the petitioner seeks time to rejoin to the additional affidavit of the respondent no.1 DDA. However, the writ petition being of the year 2005 and in the facts hereinafter appearing, need is not felt to adjourn the matter. The counsel for the petitioner then seeks a passover.

There are more than eighty matters on the Board and the matter is unlikely to reach on passover. The counsel for the respondent no.4 Mohan Cooperative Industrial Cooperative Society Ltd. (MCICS) has been heard. The records have been perused.

2. The petition has been filed seeking mandamus to the respondents i.e. DDA, MCD, Slum & JJ Wing and the MCICS to have the Plot No.E-3, Block B-1, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi of the petitioner vacated from the unauthorized occupation of *jhuggi* dwellers. The petitioner also seeks a mandamus directing the respondents to hand over vacant peaceful physical possession of the plot to the petitioner.

3. It is the case of the petitioner that it had become a member of MCICS in the year 1963; that the plot aforesaid was allotted to it on 12th January, 1979; however the execution of the Perpetual Sub Lease Deed of the said plot in favour of the petitioner was held up owing to disputes having arisen between the partners of the petitioner and the petitioner itself had intimated MCICS that the Lease Deed be executed only after

resolution of the said disputes; that the said disputes were finally settled in or about the year 1995 but thereafter owing to demise of some of the partners, the application for execution of the Lease Deed of the plot could be made only in August, 2000. The petitioner admits that the Perpetual Lease Deed was so executed in its favour on 7th June, 2001.

4. The petitioner claims that it has w.e.f. October, 2003 been writing to MCICS to have the encroachments on the plot cleared and finally this petition was filed in this regard.

5. Notice of the petition was issued and the pleadings have been completed.

6. The arguing counsel for the petitioner who has appeared now, has invited attention to the order dated 8th May, 2009 where this Court had observed that to decide the writ petition it is necessary to examine whether the encroachments i.e. the *jhuggi-jhopri* clusters on the plot of the petitioner had come into existence before the land was allotted to MCICS or thereafter and respondent no.1 DDA was directed to file an affidavit in

this regard. The same direction was reiterated in the order dated 13th September, 2010 and in fact the additional affidavit of the respondent no.1 DDA to which the petitioner was seeking time to respond, is in pursuance to the said directions.

7. The respondent no.1 DDA has in its said affidavit stated that the plot aforesaid was allotted to the petitioner on 12th January, 1979 and as per the terms and conditions of allotment the petitioner was to complete the construction within a period of two years therefrom; that post allotment, the entire correspondence of the petitioner was with MCICS only; that the Perpetual Sub Lease of the plot could not be executed with respect to the said plot on the request of the petitioner itself for the reason of *inter se* dispute between the partners of the petitioner and was executed immediately upon the petitioner approaching DDA in this regard. The respondent no.1 DDA has further stated that it has thus no role to play in removing the *jhuggi* clusters over the said land. The stand of the respondent no.1 DDA today also is that it has no liability to remove the encroachments on the land and the obligation if any for keeping the land

free from encroachment was not of the respondent no.1 DDA.

8. The counsel for the petitioner states that the said affidavit is not in compliance of the direction contained in the order dated 8th May, 2009 and it has not been categorically stated as to when the encroachments were made.

9. I do not agree. The stand of the respondent no.1 DDA in the additional affidavit is that the possession of the land was delivered to MCICS and it was thereafter MCICS and/or the members who were responsible for keeping the land encroachment free. That being the stand of the respondent no.1 DDA, the respondent no.1 DDA cannot be expected to know as to when the encroachment took place.

10. Even otherwise a perusal of the writ petition shows that the petitioner itself has not taken any categorical stand as to when the encroachment took place. Though the petitioner after the allotment in 1979, in the year 1989 wrote to MCICS stating that MCICS should secure the land but even in the said letter did not state that there was any

encroachment on the land. The petitioner for the first time started complaining in this regard only after execution of the Perpetual Lease Deed in its favour in the year 2001.

11. Though there is no document of handing over of the possession but the allotment letter requiring the allottee to complete the construction within a period of two years clearly shows that the possession stood delivered on that date itself. As aforesaid, it is not the grievance of the petitioner that on the date of allotment also the plot was encroached. The delay in execution of the Perpetual Lease Deed was of own making of the petitioner. In the facts aforesaid, it appears that the land was encroached upon after the execution of perpetual lease in favour of petitioner. Even if the encroachment is of prior thereto, so long as it is of after 1979 when allotment was made, the petitioner itself was responsible for securing possession and cannot seek mandamus to respondents to remove the same.

12. I have in judgment dated 26th July, 2011 in W.P.(C) 2174/2008 titled ***Bhartiya Janata Party v. UOI*** on conspectus of the case law on the subject held that the land allotting agencies are required to at the time of

allotment put the allottees into vacant possession of the land and cannot shirk from the same but the present case is the one where encroachments have been made after the date of allotment. This Court in **Anil Kumar Sharma v. DDA** MANU/DE/1095/2004 has held that DDA cannot be held responsible for the happenings on the plot after it has put the allottee into possession thereof.

13. Though the counsel for the petitioner has sought to argue that the rights of the petitioner in the said land accrued only on execution of the Perpetual Lease Deed in the year 2001 but upon it being pointed out to him that if that be the stand of the petitioner then the petitioner would not be entitled to the land since the rights under the Perpetual Lease Deed flow from the allotment in the year 1979, withdrew the said contention.

14. The petitioner has also claimed the relief against MCICS. The maintainability of the writ petition against MCICS was enquired into. The counsel for the petitioner has relied upon **S.D.Bhaskar v. Ishwar Nagar Cooperative House Building Society Ltd.** 45 (1991) DLT 518. However the said judgment itself holds that the dispute between a society and its

member cannot be determined in a writ petition and the exception is only in certain cases. The present case does not fall in the excepted category. Even otherwise it has been enquired from the counsel as to what is the mechanism available with MCICS for having the encroachment removed. The counsel is unable to point out any mechanism available to MCICS and relies upon the mechanism available to the respondent no.1 DDA for removal of the encroachment. However as aforesaid, the respondent no.1 DDA had allotted the land to the society much prior to the 1979 and it is not the case that the society was not put into possession of the land out of which the plot allotted to petitioner was carved out.

15. Thus the relief as sought against MCICS cannot be granted and the petitioner is not found entitled to any right as claimed against the respondent no.1 DDA.

16. The State machinery cannot be directed to be used for private purpose of the petitioner.

17. The counsel for the petitioner states that the observations in this petition of the possession having been delivered to the petitioner in 1979 as contended by MCICS may prejudice the claims of the petitioner in the Suit/Suits for possession to be filed by the petitioner.

18. It is accordingly directed that this Court having not adjudicated the said aspect, it will be open to the parties to take their respective stands in the Suit if any filed by the petitioner and any observation herein will not affect the finding to be arrived at in the said Suit.

19. There is thus no merit in the petition; the same is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**AUGUST 12, 2011
PP**