

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

Date of decision: 18th January, 2011

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W.P.(C) No.14741/2006

SH. MAULANA JAMEEL AHMAD ILYASI

..... Petitioner

Through: Mr. Nikhilesh Krishnan & Mr.
R.K. Singh, Advocates

Versus

MUNICIPAL CORPORATION OF DELHI & ANR.

..... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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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? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

RAJIV SAHAI ENDLAW, J.

1. The petitioner claims that a plot of land admeasuring 210 sq. yards in Khasra No.564 in Basti Hazrat Nizamuddin, New Delhi vests in the respondent No.2 Delhi Wakf Board (DWB); that the respondent No.2 DWB vide unregistered lease deed dated 26th June, 1980 let out the aforesaid plot of land to the petitioner. It is further the case of the petitioner that a dilapidated and unused public toilet constructed by the respondent No.1 MCD exists on the said plot of land. The petitioner earlier filed W.P.(C) No.2382/2006 in this Court seeking mandamus against the respondent No.1 MCD to demolish and remove the said public toilet and to hand over the

physical and vacant possession of the plot to the petitioner. The respondent No.1 MCD in reply to the said writ petition admitted that the land underneath the toilet complex did not belong to the respondent No.1 MCD but stated that the toilet block was constructed in the year 1975 and it was late in the day for the petitioner to seek its removal. The said writ petition was disposed of vide order dated 24th February, 2006. No relief on the basis of the title to the land as tenant claimed by the petitioner was granted to the petitioner. However, in view of the plea that the toilet block was not in use, the writ petition was disposed of with the direction to the Commissioner, MCD to look into the matter and to determine whether the toilet block was in use or not, whether any amount is being spent on maintenance thereof or not and depending upon the finding, to take a decision as to whether the toilet block should be removed or the same be continued.

2. In compliance with the aforesaid direction, the Commissioner, MCD has made an order dated 21st June, 2006 recording that the respondent No.1 MCD is in possession of the land underneath the toilet block since 1970; that the toilet block continued to exist since the year 1970 and in the year 1997-98 the respondent No.1 MCD had spent a sum of ₹2,32,000/- on the maintenance and improvement of the toilet block. It was also recorded that the respondent No.1 MCD has all intentions to maintain the toilet block for the benefit of the people living in the vicinity and the visitors to the holy shrine also situated in the vicinity of the said toilet block. The

Commissioner, MCD thus concluded that the toilet block should continue.

3. Aggrieved therefrom the present petition has been filed. Notice of the petition was issued. The respondent MCD has filed a counter affidavit. It was the contention of the petitioner on 10th December, 2007 that the toilet block is not even connected to any sewer. In view thereof, the Executive Engineer, South Zone of the Delhi Jal Board was directed to visit the toilet block and to report as to whether the same has a sewer connection or not. The Executive Engineer, South Zone of the Delhi Jal Board has filed an affidavit stating that the toilet block is connected to the sewer. The respondent No.2 DWB has also filed a counter affidavit supporting the petitioner.

4. The counsel for the petitioner has been heard.

5. The counsel for the petitioner with reference to the additional affidavit dated 8th May, 2008 of the respondent No.1 MCD has contended that the respondent No.1 MCD admits that Khasra No.564 in the Khatoni is shown as Gair Mumkin Kabristan and shown to be in the ownership of the Government and has further admitted that the said Khasra number has also been shown as Muslim Graveyard in the Gazette Notification dated 31st December, 1970 vesting the same in the respondent No.2 DWB. It is thus contended that the respondent No.1 MCD admits the ownership of the land underneath the toilet block of the respondent No.2 DWB. It is contended

that once the respondent No.1 MCD admits the ownership of respondent No.2 DWB and whose tenant the petitioner is, the respondent No.1 MCD cannot maintain the toilet block on the land aforesaid and is required to remove the same. It is urged that the petitioner on the basis of his title alone is entitled to a direction to the respondent No.1 MCD to remove the toilet block and to hand over possession of the land to the petitioner irrespective of whether the toilet block is in use or disuse.

6. As aforesaid, the same relief was sought by the petitioner in the earlier writ petition also but was not granted to the petitioner. It was open to the petitioner to then also contend that irrespective of whether the toilet block is in use or disuse, the petitioner on the basis of title as tenant to the land was entitled to the said land. The petitioner having been denied the said relief in the earlier writ petition is not entitled to maintain a second writ petition on the same ground. This Court in the order disposing of the earlier writ petition itself has observed that the claim for possession would not be maintainable owing to the principle of laches, acquiescence and waiver.

7. The counsel for the petitioner during the course of hearing has admitted that the toilet block has existed on the land since prior to the time of execution of lease thereof in favour of the petitioner in the year 1980. Once that is the position and it is the plea of the respondent No.1 MCD that the toilet block has been in existence since the year 1970, the writ petition claiming possession filed for the first time in the year 2006 i.e. after nearly

36 years would certainly be barred on the principle of laches and waiver.

8. The remedy if any of the petitioner is by way of suit and in the circumstances aforesaid possession cannot be directed to be delivered in writ jurisdiction.

9. The counsel for the petitioner has also invited attention to ***MCD Vs. Prem Singh*** 47 (1992) DLT 207 but the same was also a suit and not a writ petition.

10. The counsel for the petitioner has next contended that since the writ petition has remained pending for the last four years and if the petitioner is now directed to prefer a suit further delay would be caused and the petition is maintainable on that ground alone. The same cannot be accepted. What was not maintainable on the date of filing cannot become maintainable merely for the reason of keeping this petition pending in this Court for long. The remedy of writ petition was misconceived and the petitioner if claims to be entitled to possession, ought to have availed the remedy of suit for possession against the respondent No.1 MCD.

11. The counsel for the petitioner has also contended that the Commissioner, MCD inspite of direction in the order disposing of the earlier writ petition has not returned any finding of the toilet block being in use.

12. I am unable to accept the said contention also. The Commissioner,

MCD by recording that substantial monies were being spent on maintenance and improvement of the toilet and that the same was required considering the location, has recorded a finding in terms of the directions in the earlier writ petition.

13. The counsel for the petitioner on the basis of photographs has next contended that the toilet infact is not in use. He seeks appointment of a Court Commissioner to determine the said fact.

14. The contention earlier of the counsel for the petitioner of the toilet block not having sewer connection was not supported by the appointment as aforesaid of an independent Executive Engineer from another agency who has categorically reported that the toilet block is connected to a sewer connection. No response to the said affidavit of the Executive Engineer, South Zone of the Delhi Jal Board has been filed. This Court cannot in this writ jurisdiction enter into the said enquiry.

15. The jurisdiction to determine the requirement of a public toilet in a locality has been vested under Section 359 of the Delhi Municipal Corporation Act, 1957 in the Commissioner. I have in judgment dated 13th July, 2010 in W.P.(C) No.4562/2010 titled ***Shri Manish Gupta Vs. MCD*** and in order dated 21st October, 2010 in W.P.(C) No.13803/2009 titled ***Ashok Sharma Vs. MCD*** dealt with the said aspect and on the basis of consistent judgments of this Court have held that the Courts will not

ordinarily interfere with the decision of the Commissioner, MCD in this regard unless the decision is shown to be such which no reasonable person could have reached. Here the Commissioner, MCD with reference to the requirement of the public toilet has found the necessity to continue therewith.

16. There is thus no merit in the petition. The same is dismissed with liberty aforesaid to the petitioner to institute a suit for possession as aforesaid.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

JANUARY 18, 2011
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