

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

Date of decision: 9th September, 2011.

+ **W.P.(C) 2875/2003**

% **PREM KUMAR & ORS. Petitioners**

Through: Ms. Nandni Sahni, Adv.

Versus

LT. GOVERNOR, NCT OF DELHI & ORS Respondents

Through: Mr. Sanjay Kumar Pathak, Adv. for
R-1 & 6 GNCTD.
Ms. Shobhana Takiar, Advocate for
R-2 & 3.
Mr. Ravinder Agarwal, Adv. for R-5.
Mr. Pankaj Batra, Adv.

AND

+ **W.P.(C) 24759-65/2005**

% **SMT. KRISHNA BHALLA & ORS. Petitioners**

Through: Ms. Nandni Sahni, Adv.

Versus

DDA & ANR Respondents

Through: Mr. Rajiv Bansal, Adv. for DDA.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Not necessary

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| 2. | To be referred to the reporter or not? | Not necessary |
| 3. | Whether the judgment should be reported in the Digest? | Not necessary |

RAJIV SAHAI ENDLAW, J.

1. W.P.(C) No.2875/2003 was filed impugning the order dated 7th April, 2003 of the respondent DDA of demolition and sealing of the properties of the 12 petitioners in Village-Mahipalpur, Delhi. The respondent DDA had exercised such jurisdiction under Section 30(1) and Section 31A of the Delhi Development Act, 1957 claiming the properties of the petitioners to be falling in Development Area 176 of DDA. It was however the claim of the petitioners that their properties fall on Khasra Nos.723/2, 733/2 and 734/2 in Village-Mahipalpur and Village-Mahipalpur does not fall in Development Area 176 and thus respondent DDA had no jurisdiction to issue such orders.

2. The Commissioner (Land Management), DDA has in the impugned order held that Development Area has no relation with the revenue estate and since the properties of the petitioners fell in Development Area 176, DDA was empowered to exercise powers with respect thereto. It was further held that a part of Village-Mahipalpur fell in the said Development Area and

the properties of the petitioners fell in the said part and hence DDA was/is entitled to exercise powers with respect thereto.

3. It is not in dispute that so far as the order of sealing of the properties is concerned, the Supreme Court in *M.C. Mehta Vs. Union of India* AIR 2006 SC 1325, reaffirming the Full Bench of this Court in *Bajaj Departmental Store Vs. MCD* AIR 2002 Del. 520 held that DDA does not have the power of sealing on account of misuser. Thus the challenge is concerned with order of demolition only and to the order of sealing only if on account of unauthorized construction or unauthorized development. In fact the impugned order dated 7th April, 2003 came to be made in pursuance to the order dated 23rd September, 2002 in Civil Writ Petition No.6041/2002 earlier preferred by the petitioners, remanding the matter to the DDA for disposal after hearing the petitioners.

4. It is not in dispute that the order of the DDA impugned in this petition is appealable before the Appellate Tribunal. The said fact was within the knowledge of the petitioners also, as appears from the very first order dated 30th April, 2003 in W.P.(C) No.2875/2003. It was however the contention of

the petitioners on that date that their challenge to the order dated 7th April, 2003 was confined only to the plea that their properties were not situated in Development Area 176 and they were not pressing any other ground against the order dated 7th April, 2003. Notice to show cause was issued limited to the aforesaid argument.

5. Pleadings have been completed. The counsel for the respondent DDA has at the outset invited attention to the order dated 14th January, 2011 when the counsel for the petitioners has taken time to take instructions whether the petitioners are willing to avail of the remedy of appeal.

6. The counsel for the petitioners today, on the basis of various documents on record has argued that the respondent DDA has failed to satisfy this Court that the properties of the petitioners are situated in Development Area 176. It is contended that certain other persons with respect to whose properties, also purportedly in the aforesaid area, similar order was made, had approached the Appellate Tribunal and which appeals were also allowed holding that there is nothing to show that the area was a Development Area.

7. Per contra, the counsels for the respondent DDA have contended that it was only after hearing on 14th January, 2011 that the petitioners had sought time to decide whether to prefer an appeal and now on change of roster the matter is being re-argued. They have also controverted that the petitioners are similarly placed as the persons whose appeals were allowed by the Tribunal. The counsels for the respondent DDA refer to various documents to show that the properties of the petitioners are in fact a part of Development Area.

8. Mr. Ajay Verma, Adv. also a Standing Counsel for DDA and who happens to be present in court also informs that there are several other litigations of village-Mahipalpur and orders with respect to several properties in the said area have also been passed by the Monitoring Committee appointed by the Supreme Court and by the Division Bench of this Court, also proceeding on the premise that the said area is a Development Area of the DDA.

9. After considering the rival contentions, I am of the opinion that it cannot be said that there is any unambiguous material before this Court on

the basis whereof it can be said whether the properties of the petitioners are in a Development Area or not. The matter requires detailed investigation and in the face of alternative remedy where the said exercise can be undertaken being available, need is not felt to entertain the petition.

10. The counsel for the petitioners has contended that since the petitions have remained pending for the last 8 years, this Court may adjudicate the controversy.

11. It is apparent from the order dated 30th April, 2003 that the petitioners took a calculated risk. Merely because a notice to show cause was issued, does not compel this Court to entertain the petition. In the light of what has transpired above, no case for bypassing the alternative remedy provided is made out. If the petitioners, on the date of filing of petitions were not entitled to maintain the petition for the reason of availability of alternative remedy, merely because they have been successful and in keeping the same pending in this Court for 8 years would not vest any right in the petitioners to have the petition entertained by this Court.

12. The counsel for the petitioners seeks extension of interim protection which the petitioners have enjoyed till now, to enable the petitioners to avail of the alternative remedy. It is further stated that the petitioners be also relieved of their statement supra of not pressing any other challenge to the order dated 7th April, 2003.

13. The counsels for the respondent DDA oppose the aforesaid request.

14. In my view the petitioners having given up the other challenge if any to the order dated 7th April, 2003 and having confined the challenge to the order only on the aspect of the properties being not falling in Development Area cannot now be permitted to revive the other grounds of challenge if any. As aforesaid, the objection as to the maintainability of the petitions was considered on the very threshold and the petitioners cannot be permitted to approbate and reprobate. However since nevertheless the petitions remained pending in this Court, it is deemed appropriate to extend the protection enjoyed by the petitioners till now, to enable the petitioners to avail the alternative remedy.

15. The counsels state that the position in W.P.(C) No.24759-65/2005 is the same.

16. The counsel for the petitioners at this stage states that applications for substitution of legal heirs are pending in W.P.(C) No.2875/2003.

17. The counsels for the respondents have been heard on the said applications. The delay in filing the applications for substitution is condoned and the substitution is permitted.

18. In view of the aforesaid, the petitions are dismissed as not maintainable for the reason of the alternative remedy of appeal to the Tribunal being available to the petitioners and with liberty to avail the alternative remedy. Since notice to show cause was issued and the petitions have remained pending in this Court, it is further directed that subject to the appeal being preferred within four weeks of today, the same shall be entertained without objection on the plea of limitation. It is further directed that till the disposal of the applications for interim relief and/or of the appeal, the interim protection which the petitioners have enjoyed in this

petition shall continue, subject to the petitioners not making any changes whatsoever in the properties and not transferring, encumbering or parting with possession thereof. It is clarified that any observation made herein would not prejudice the case of any of the parties before the Appellate Tribunal. The matter having already remained pending for long, the Appellate Tribunal is requested to dispose of the same expeditiously.

Copy of this order be given *Dasti*.

**RAJIV SAHAI ENDLAW
(JUDGE)**

SEPTEMBER 09, 2011

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