

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

Date of decision: 5th April, 2011

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W.P.(C) 8796/2009 & CM No.6090/2009

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KAMAL GOODS CARRIER (REGD.)

.... Petitioner

Through: Mr. V.K. Sharma, Adv.

Versus

MCD & ORS.

....Respondents

Through: Mr. Mukesh Gupta with
Ms. Shuchismita, Advocates for
MCD

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? | 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 writ petition impugns the challaning of the petitioner and upon non-payment of the challan amount, the consequent proceedings initiated

against the petitioner under Sections 357 & 397 of the Delhi Municipal Corporation (DMC) Act, 1957 before the Special Metropolitan Magistrate. Notice of the writ petition was issued and vide interim order, coercive steps against the petitioner stayed.

2. While Section 357 *supra inter alia* prohibits owner/occupier of any premises from throwing / depositing rubbish upon any street, Section 397 *supra inter alia* prohibits deposit of material of any description in any public street. The petitioner was challaned with respect to the street outside its premises in Transport Centre at Punjabi Bagh, Rohtak Road, developed by the respondent no.3 DDA.

3. The challenge to the challan / proceedings is made on the ground that the respondent no.3 DDA having not handed over the operation of the said Transport Centre to the respondent no.1 MCD, MCD is not entitled to challan or initiate the aforesaid proceedings.

4. It is the case of the petitioner that the respondent no.2, being an official of the MCD has challaned / initiated the said proceedings against the petitioner for the reason of the petitioner refusing to pay the bribe demanded

by the said official. It is further the case of the petitioner that the occupants of other properties in the said Transport Centre similarly placed as the petitioner but who have succumbed to the demand of the respondent no. 2 have not been so challaned.

5. Needless to state that the factual aspects cannot be the subject matter of writ jurisdiction and have also not been urged and are stated only to complete the picture.

6. The only ground urged is that without the respondent no.3 DDA handing over the Transport Centre to the respondent MCD, the provisions of Sections 357 & 397 are not applicable thereto or to the streets within the said Transport Centre. The petitioner relies upon the response given by the respondent no.3 DDA to the query of the petitioner and in which reply it was stated that civic services like scavenging of roads and storm water drains etc. in the said Transport Centre are being looked after by the respondent no.3 DDA.

7. In view of the aforesaid position, this Court also on 28th July, 2009 directed the counsels for the respondents MCD and DDA to obtain specific

instructions as to whether the said Transport Centre fell within the jurisdiction of MCD or not.

8. The respondent no.3 DDA has filed an affidavit in which it is stated that the maintenance of civic services of the Transport Centre is yet to be handed over to MCD.

9. The respondent MCD in its counter affidavit has stated that the petitioner was challaned because the petitioner had deposited on the road outside its premises in the Transport Centre its goods, creating nuisance and insanitation conditions. The respondent MCD has asserted its right to take action therefor in accordance with law and has further asserted that the Transport Centre falls within its jurisdiction.

10. Finding that the provisions of the DMC Act by virtue of Section 1(2) thereof extend to “Delhi” defined in Section 2(10) of the Act as “the entire area of Union Territory of Delhi except New Delhi and Delhi Cantonment”, it was enquired from the counsel for the petitioner whether the Transport Centre fell in Delhi so defined or not.

11. The counsel for the petitioner while not controverting that the Transport Centre is in Delhi however refers to Section 12 of the Delhi Development Act, 1957 (DD Act) to contend that the Transport Centre is a “development area” within the meaning of the said provision. Reference is further made to para 42 of the judgment in *M.C. Mehta Vs. Union of India* AIR 2006 SC 1325 laying down that the Scheme under the DD Act is that during the development, it is the responsibility of DDA to demolish and seal any premises if there is contravention and after handing over of the area to the local authority under Section 36 of the DD Act, the power of demolition and/or sealing is conferred on local authority whether it be MCD or Delhi Cantonment or any other authority depending upon the development area falling in the local limits of one or other. It was further held that so long as a area is a development area, the power to deal with it remains with the DDA in terms of Section 3(i) of the Act and it is only after the responsibility thereof has been assumed by the local authority in the manner provided in Section 36, the power to deal with the properties in that area for any contravention would be exercisable by the local authority.

12. I have enquired from the counsel for the petitioner as to whether the observations in the judgment aforesaid, made with specific reference to action against unauthorized construction should be extended to applicability of the other provisions of the DMC Act and whether such an interpretation would not amount to restricting the applicability of the DMC Act without the Legislature having provided so. The counsel for the petitioner is unable to show any provision, neither in the DD Act nor in the DMC Act permitting such restrictions of applicability of the provisions of the DMC Act.

13. Section 36 of the DD Act entitles DDA to require the local authority (within whose local limits the area so developed is situated) to assume responsibility “for maintenance of amenities which have been provided in the area” by the DDA and for the provision of amenities which have not been provided for the DDA but which in its opinion should be provided in the area. It will be seen that there is nothing therein also restricting the applicability of the provisions of the DMC Act. Rather, the same recognizes the development area being situated within the local limits of the local authority i.e. the MCD in the present case.

14. The counsel for the respondent MCD has contended that Sections 357 & 397 supra are to be found under Chapter XVII titled “Sanitation and Public Health” and under Chapter XIX titled “Public Safety and Suppression of Nuisances” respectively. It is further contended that the streets in the Transport Centre, with respect whereto the petitioner has been challaned are public streets and vest in the MCD and MCD is entitled to take action for violations with respect thereto, irrespective of whether the area has been handed over by the DDA to MCD or not.

15. Attention of the counsel for the petitioner has been invited to *MCD Vs. Hira Lal Tota Ram* AIR 1972 Delhi 29 where this Court held that the DMC Act applied to villages situated in Delhi and the public streets in the said villages vest in the MCD and MCD is empowered to prohibit encroachment thereon and was rather obliged to remove encroachment from the same and the Gaon Panchayats under the Delhi Land Reforms Act, 1954 are not placed in the same position as the MCD though under the Panchayat Raj Act, 1954, the Gaon Panchayat was also entitled to remove encroachment in the public street. It was held that merely because the Gaon

Panchayat was also entitled to take the said action, it could not be said that the Gaon Panchayat alone had the exclusive power to do so and the MCD was precluded from doing so. It was yet further held that even if there were any inconsistencies between the provisions of the DMC Act and the Delhi Land Reforms Act and the Panchayat Raj Act, then it would be the provisions of the DMC Act which would prevail to the extent of the repugnancy for the reason of the DMC Act being an enactment subsequent to the Delhi Land Reforms Act and the Panchayat Raj Act and also for the reason of Section 22 of the Government of Part C States Act, 1951.

16. It may be noticed that the DD Act on the basis whereof the powers of the MCD are sought to be excluded in the present case is of the same year as the DMC Act; rather, while the DD Act is Act 61 of 1957, the DMC Act is Act 66 of 1957 and the DMC Act can thus be said to be an enactment subsequent to the DD Act. Thus the principles laid down in the judgment aforesaid apply on all fours.

17. Independently of the aforesaid judgment also, I am of the opinion that no restrictions on the applicability of the DMC Act as contended can be

read. The scope of the DMC Act and the DD Act are entirely different; while the DMC Act is concerned with the municipal governance of Delhi and under Section 41 thereof municipal governance of Delhi has been vested in MCD and which would include maintenance and removal of encroachment from the streets, the DD Act is concerned with development of Delhi and which has been defined in Section 2(d) thereof itself as carrying out of building, engineering, mining or other operations in or over or under land or the making of any material change in any building or land including by way of re-development. The DD Act is thus not concerned with municipal governance or with the removal of encroachment from streets and/or sanitation, nuisance etc. except when in relation to development.

18. The construction, maintenance, improvement of public streets and the removal of obstruction in public streets are the obligatory functions of the MCD under Section 42 (n) and (p) of the DMC Act. Section 2(57) thereof defines “street” as including any way, road, lane, square, court, alley, gully, passage over which the public have a right of way. It is not the case of the

petitioner that on the street, with respect to which it was challaned, the public has no right of way. Thus the said street is a “street” within the meaning of Section 2(57). Section 2(44) defines “public street” as a street which vests in the MCD as a public street. Section 298 vests all streets within Delhi which are or at any time become public streets, in the MCD and to be maintained, controlled and regulated by MCD. Though under Section 298(3) the Central Government is empowered to, by notification direct that all or any of the functions of the Corporation in respect of public streets shall be performed by such authority as may be specified but it is not the case of the petitioner that there is any notification vesting the powers of the MCD in relation to the said street in the Transport Centre in the DDA or in any other Body / authority.

19. The object of the DDA as specified in Section 6 of the DD Act do not show that the DDA is concerned with such public streets. Similarly, I do not find anything in Sections 12 or 36 or any other provision of the DD Act to show that the streets open to the public in such development areas of the DDA do not vest in the MCD. Merely because DDA has chosen to carry

out the work of scavenging in relation to the streets in the Transport Centre itself, would not lead to any such inference of the streets not vesting in the MCD. Even otherwise there is no power in the DD Act empowering the DDA to remove encroachments from the public streets within development areas as the Transport Centre is. If it were to be held that MCD has no such power in the development areas of DDA it would lead to incongruous situation whereby no Public Body or Authority would have jurisdiction to remove such encroachments / obstructions on public streets and which state of affairs cannot be permitted.

20. The Supreme Court in *Municipal Committee, Karnal v. Nirmala Devi* (1996) 1 SCC 623 held that every street which is a public street vests in the Municipal Committee and if unauthorized construction is made by encroaching on it, the Municipal Committee has the power to have the unauthorized encroachment and construction removed even if such encroachment is in the nature of a private property. The Supreme Court in *Gobind Pershad Jagdish Pershad v. New Delhi Municipal Committee* (1993) 4 SCC 69 also held that even if a private space is

dedicated by the owner thereof to the public and acquires the character of a street, the owner ceases to have any right thereto and the Municipality becomes entitled to exercise its powers with respect thereto as owner. Applying the said principle to the instant case, even a street open to the public in a development area belonging to the DDA would vest in the MCD and be governed by the provisions of the DMC Act.

21. The Division Bench of this Court as far back as in *Refugees Co-operative Housing Society Ltd. and Ors. v. Municipal Corporation of Delhi* ILR (1972) 1 Delhi 725 held that the provisions of Section 42 are mandatory and that a statutory duty has been placed upon the MCD to make adequate provision for each of the matters enumerated in the various clauses of the Section. The reason is not hard to fathom. The obstruction, if any, by the petitioner on the public street prejudices other citizens and affects the rights of other citizens and the public Body/authority in which the power to safeguard such interest is vested is certainly entitled to take action with respect thereto.

22. Section 53A of the DD Act may also be noticed in this regard. In my view it recognizes the applicability of the Municipal laws also, including to the development areas. All that it requires is for the rules, regulations or bye laws, if any, made by the local authorities as the MCD in respect of the matters specified in Section 53A(2) to be with the approval of the DDA. Section 53A nowhere makes any mention of streets/public streets.

23. The Division Bench of this Court in *M.K. Vasuraj v. Delhi Development Authority* ILR (1971) 2 Delhi 21 held that throughout the scheme of the Act, the spheres of operation of the “Authority” and the “local authority” are kept distinct. The aforesaid judgment also lays down that when an administrative authority files a complaint against a person in a criminal court as has been done by the MCD in the present case, the merits of the complaint can be fully gone into by the Criminal Court including all questions of fact and law, and petitions under Article 226 of the Constitution of India at the stage of filing of the complaints are not entertainable.

24. After having reached the conclusion as aforesaid that “streets” in “development areas” of DDA also vest in MCD as public street, I find the

question to be no longer *res integra*. This Court as far back as in ***Chander Bhan Sharma v. Suraj Bhan*** ILR (1970) 1 Delhi 792 was faced with the question as to whether the declaration of Krishan Nagar as development area for purposes of the DD Act had the effect of divesting the jurisdiction which MCD had over Krishan Nagar. It was held that entrustment if any of an area to DDA is just for the purposes of development as defined in the DD Act and the MCD continues to be responsible for the performance of the obligatory and discretionary functions under Sections 42 and 43 of the DMC Act and that the area though entrusted to the Development Authority for the purposes of development, continues to be subject to the jurisdiction of MCD if situated within the territorial limits of MCD.

25. Mention in this regard may also be made to the recent dicta in ***Bondu Ramaswamy v. Bangalore Development Authority*** (2010) 7 SCC 129 noticing the distinction between a Development Authority and a Municipality and their respective functions and laying down that the provisions relating to one will not nullify or render redundant the provisions of the other.

26. As far as the reference by the counsel for the petitioner to *M.C. Mehta* (supra) is concerned, the question which fell for adjudication therein was relating to the power of MCD and DDA to seal the premises in case of misuse. The Court in para 14 of the judgment expressly noted that it was considering only the issue of misuser and not even the issue of unauthorized construction. It was in this context that the observations in para 42 of the judgment relied upon by the petitioner came to be made. The Apex Court in that case was not concerned with the question for adjudication in the present petition.

27. There is thus no merit in the petition. The same is dismissed with costs of Rs.5000/- on the petitioner payable to the MCD within four weeks of today.

**RAJIV SAHAI ENDLAW
(JUDGE)**

APRIL 05, 2011
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