

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

Date of decision: 19th January, 2011

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W.P.(C) 4515/2008

P.N. KOHLI

.....Petitioner

Through: Mr. R.K. Saini, Advocate

Versus

UNION OF INDIA & ORS.

....Respondents

Through: Mr. Nawal Kishore Jha,
Advocate for respondent No.2.
Ms. Alka Sharma, Advocate for
respondent No.3.

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 petitioner, claiming to be the owner of Flat No.46, Vasant Cooperative Group Housing Society, Mayur Vihar Phase-I, Delhi and having carried out certain additions and alterations in his flat which have

been booked as unauthorized by the MCD and with respect where to an order of demolition has been passed, has filed this writ petition averring that similar additions and alterations are permissible in DDA Flats and that Government should take a decision on as to why the same are not being permitted in Cooperative Group Housing Society (CGHS) Flats. It is pleaded that the Government had appointed a Committee known as Dogra Committee in this regard which has recommended extension of the permission for additions/alterations as in DDA Flats, to CGHS Flats also but the Government has not taken any decision in this regard. The counsel for the petitioner confines the relief in this writ petition only to a direction to the Government to take a decision on the said report of the Dogra Committee.

2. On 21st October, 2010, it was enquired from the counsel for the petitioner as to what is the right of the petitioner to claim the relief of directing the Government to take such a decision. Attention of the counsel was invited to the judgment of this Court qua the notification of the Delhi Rent Act, 1995 and in which it has been held that no such

direction can be issued to the Government. The counsel for the petitioner had then sought adjournment to address on this aspect.

3. The counsel for the petitioner has today contended that the judgments qua the Delhi Rent Act, 1995 (of this Court titled *Common Cause Vs. Union of India* AIR 2001 Delhi 93 and of the Apex Court reported in AIR 2003 SC 4493) would have no application since what was sought therein, was bringing into force a legislation and with respect whereeto it was held that no mandamus can be issued by the Courts. He has contended that the petitioner herein is not seeking the relief of directing the Government to accept the recommendation of the Dogra Committee or a direction against the Government to allow in CGHS flats additions, alterations as are permissible in DDA flats; that he is only seeking a direction to the Government to take a decision.

4. It is contended that issuance of such a direction is within the domain of the Courts. Reliance in this regard is placed on:

- (i) *Aeltemesh Rein, Advocate, Supreme Court of India Vs. Union of India* AIR 1988 SC 1768 where direction was given to the Central Government to, within a reasonable time consider the question whether Section 30 of the Advocates Act, 1961 was to be brought into force or not.
- (ii) *Supreme Court Legal Aid Committee Vs. Union Of India* (1998) 5 SCC 762 where a direction was issued to the States / Union Territories which had till then not constituted Legal Services Committees required to be framed under Section 29A of the Legal Services Authorities Act, 1987, to constitute the various Committees under the Act within a period of two months.
- (iii) Order dated 21st November, 2009 of the Government of Kerala recording that the Supreme Court had directed the Government to take a decision on the Report of the Kerala State Commission for Backward Classes.

- (iv) Press Note reporting that the Supreme Court had directed the Government of India to come out with a final decision on the minority status of the Jain Community.

5. The counsel for the petitioner has contended that issuance of such a direction is in the fitness of things inasmuch as the exercise conducted by the Government of appointing the Dogra Committee and spending money thereon cannot be allowed to be wasted. It is contended that more than four years have passed since the Dogra Committee has submitted its recommendations and the Government ought to have taken a decision and if is not so taking the decision, the Court is entitled to direct it to so take the decision.

6. The counsel for the respondent No.3 (being a neighbour of the petitioner and on whose complaint action was taken against works carried out by the petitioner) has relied on:

- (i) ***M.C. Mehta Vs. Union of India*** AIR 2006 SC 1325 observing that there is no discretion in the MCD to order or not to order demolition of unauthorized construction.
- (ii) ***Municipal Corporation of Delhi Vs. Rishi Raj Jain*** AIR 2006 SC 3268 observing that the Courts although can interpret a statute, cannot issue a guideline which would be contrary to the provisions of the statute.
- (iii) ***Kavita Vs. MCD*** 2000 III AD (Delhi) 1 reiterating that mandamus cannot be issued against the provisions of the statute.
- (iv) ***Rawat Mal Jain Vs. DDA*** AIR 1995 Delhi 105 laying down that the Court while exercising the discretion will not extend a helping hand to the person invoking its equity jurisdiction for grant of an ad-interim injunction when he approaches for preserving what he has gained by violating the law.

(v) ***Priyanka Estates International Pvt. Ltd. Vs. State of Assam***

AIR 2010 SC 1030 holding that illegal and unauthorized construction beyond the sanctioned plans are required to be dealt with by firm hand and such violations are not likely to fall in the category of compoundable items and the necessary consequence thereof is demolition thereof.

7. It is also contended that the petitioner has encroached upon the land / space outside his flat also and the unauthorized construction made by the petitioner is not permissible in DDA flats also.

8. The first question which arises for consideration is whether a direction as sought can be given to the respondents to take a decision on the recommendations of the Dogra Committee.

9. The judgment in ***Aeltemesh Rein, Advocate, Supreme Court of India*** (supra) on which strong reliance is placed by the counsel for the petitioner was considered by the Full Bench of this Court in AIR 2001

Delhi 93 (supra). It was observed that inspite of the direction, Section 30 of the Advocates Act, 1961 subject matter of that judgment was still not brought into force. Similarly with respect to the judgment in ***Supreme Court Legal Aid Committee*** (supra), it was said that the same has to be read in the context of the contents of the affidavit filed in that case and which showed the willingness of the Central Government. Else this Court reiterated the principles in ***A.K. Roy Vs. Union of India*** AIR 1982 SC 710 that it is not for the Courts to censure the Executive nor is it for the Courts to take over the function of the Parliament, otherwise, there will be chaos with each organ of the State overstepping its jurisdiction and interfering with the functions of another organ of the State.

10. I am also of the view that the directions in ***Aeltemesh Rein*** and in ***Supreme Court Legal Aid Committee*** were in Public Interest Litigations. The present is not a petition of such a nature. The petitioner is not serving any public interest. The petition has been filed in his personal private interest to perpetuate the admitted unauthorized construction carried out by him. The powers and jurisdiction of this Court in a Public

Interest Litigation are vastly different and the same powers cannot be exercised in a private lis.

11. If the contention of the petitioner were to be accepted, then it would open doors for the Courts to issue directions to the Legislature and the Executive to take decisions on all walks of life and qua claims of citizens not presently recognized by any statute / law; it would open the doors to the litigants to then contend that the legislature should be directed to take a decision whether to make a particular law or not which would benefit the said litigant.

12. In this regard, I may also note that taking a decision in such matter would require a complete decision on the framing of law and would result in chaos and would be in the teeth of the judgment of the Constitution Bench in **A.K. Roy** (supra).

13. I find that a Division Bench of the High Court of Himachal Pradesh had directed the Chief Secretary to the Government of Himachal Pradesh to file an affidavit setting out what action had been taken by the

State Government towards implementation of the recommendations contained in the Report of the Anti-Ragging Committee. In appeal preferred by the State, the Supreme Court in the judgment reported in *State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla* (1985) 3 SCC 169 held that the order of the High Court so directing was wholly unsustainable, even though made in a Public Interest Litigation. It was held that the direction of the High Court ostensibly did no more than call upon the Chief Secretary to inform the Court as to what action the State Government proposed to take on the recommendations, in fact and substance, intended to require the State Government to initiate legislation on the subject. It was held that the direction was nothing short of an indirect attempt to compel the Government to initiate legislation and which the Court was not entitled to do. It was further held that it is entirely a matter for the executive branch of the Government to decide whether or not to introduce a particular legislation and is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution. The Supreme Court held that the Court cannot group the function assigned to the

Executive and the Legislature under the Constitution and it cannot even indirectly require the Executive to introduce a particular legislation or the Legislature to pass it or assume to itself a supervisory role over the law making activities of the Executive and the Legislature.

14. In *State of Himachal Pradesh Vs. Umed Ram Sharma* (1986) 2 SCC 68, the High Court had directed the State Government to allot a particular sum for expenditure on account of particular project. The Supreme Court posed the questions, how far the Court could give directions which are administrative in nature and whether any direction could be given to build roads where there are no roads and whether the Court could direct that the administration should report from time to time so that action taken can be supervised by the Court. The Supreme Court found that the Executive was not oblivious of its obligation though in its sense of priority there may have been certain lethargy and inaction. It was observed that there had been at the highest a slow application of energy in the action by the Executive. In these circumstances, it was held that by the process of judicial review, if the High Court activates or

energizes executive action, it should do so cautiously. I find that in the present case also, it cannot be said that the respondents are not conscious of the question whether the same Rules as applicable to DDA flats should apply to CGHS flats also; a Committee was constituted for the said purpose. Maybe, there has been some lethargy in taking a decision on the report of the Dogra Committee, however, the same is not such to invite interference by this Court. It was held that the Court must know its limitations in these fields; the Court should remember that the Judge is not to innovate at pleasure and is to exercise discretion informed by tradition.

15. A seven-Judge Bench of the Supreme Court in ***P. Ramachandra Rao Vs. State of Karnataka*** (2002) 4 SCC 578 held that instances of judicial excessivism that fly in the face of the doctrine of separation of powers which envisages that the legislature should make law, the Executive should execute it and the judiciary should settle disputes in accordance with the existing law; the Court went to the extent of holding various dictas of two- Judge and three-Judge Benches of the Supreme

Court in Public Interest Litigations to be not legitimate exercise of judicial power. It was observed that giving directions of a legislative nature is not a legitimate judicial function.

16. Reference may also be made to *Common Cause (A Regd. Society) v. Union of India* (2008) 5 SCC 511 holding that Courts cannot create rights where none exist nor they can go on making orders which are incapable of enforcement or direct legislation or proclaim that they are playing the role of a law maker merely for an exhibition of judicial valour.

17. There is another aspect of the matter. The necessary corollary of holding that such a direction can be given to the Legislature / Executive would be to, till then, protect the petitioner. It would result in perpetuating and continuing an action which under the law as existing today is admittedly illegal. This also brings to the fore the essential distinction between a Public Interest Litigation and a private lis. In a Public Interest Litigation while giving such a direction no illegality is being perpetuated but in a private lis it would be so. I may notice that it

is the contention of the respondent No.3 that owing to pendency of the present petition, the demolition order against unauthorized works carried out by the petitioner is not being enforced. Public Interest Litigations are by and large meant for enforcement of Fundamental Rights. On the contrary, the petitioner here cannot be said to be having a Fundamental Right for regularization of the unauthorized constructions carried out by him. The Supreme Court in *Sheela Barse Vs. Union of India* (1988) 4 SCC 226 held that in a Public Interest Litigation unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights; the proceedings cut across and transcend the traditional forms and inhibitions; relief to be granted looks to the future and is generally corrective as against determination of legal consequences of past events. Division Benches of this Court in *Bhagwat Dayal Sharma Vs. UOI* ILR (1974) 1 Del 847 and *Peoples Union for Democratic Rights Vs. Ministry of Home Affairs* ILR (1987) 2 Del 235 have held that where the power to do or not to do a thing is optional and discretionary and there is no statutory obligation, direction to the Executive to do a particular thing cannot be given even where matter is of

public importance. In the present case also no obligation on the part of the respondents to take a decision on the Dogra Committee is shown. It is purely a policy matter. The Supreme Court in ***Kanhaiya Lal Sethia Vs. UOI*** (1997) 6 SCC 573 held that it is not open to a petitioner to seek a direction to the Union of India to introduce an official Bill in the Parliament or to sponsor a Private Member's Bill to be introduced on the subject. If the argument of the counsel for the petitioner in the present case were to be accepted it could have been argued there also that merely by introduction of a Bill, its enactment was not being sought. It was held that Courts do not interfere in policy matters of the State unless the policy violates the mandate of the Constitution or any statutory provision or is otherwise actuated by *mala fides*.

18. I am therefore of the opinion that the petitioner is not entitled to the relief claimed of directing the respondents to take a decision on the Dogra Committee report.

19. The counsel for the petitioner has then invited attention to the prayer clause also claiming the relief of directing the MCD to consider

the application of the petitioner for regularization. In view of the admitted position that the principles and rules on the basis whereof regularization is claimed are not applicable to CGHS flats, no purpose would be served therefrom. Even otherwise, I am of the opinion that the claims, if any, for regularization ought to have been made by the petitioner in the proceedings in which the order of demolition was made. The said order has now attained finality. The petitioner cannot now have a second round. If such practice were to be permitted, no order of unauthorized construction would ever be implemented.

The petition is therefore dismissed. I refrain from imposing any costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

JANUARY 19, 2011
(corrected and released on 3rd February, 2011)
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