

\$~26.

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

+ W.P.(C) 4453/2012

%

Judgment dated 08.04.2013

NIRAJ KHANDLWAL

..... Petitioner

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

versus

PRADEP GARG

..... Respondent

Through : Mr.Anil Sapra, Sr. Adv. with Ms.Charul Sarin and Ms.Veena Agrish, Adv. for respondents no.1-3.
Mr.Gaurang Kanth, Adv. for respondents no.4 and 5.
Mr.Yogesh Saini, Adv. for Mr.V.K. Tandon, and Mr.Shariq Mohammad, Adv. for respondent no.6.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. By the present writ petition, the petitioner seeks a direction to restrain respondents no.1 to 3 from carrying out any unauthorized construction from the premises bearing no.10, Jamuna Marg, Civil Lines, Delhi. The petitioner further seeks directions to respondents no.1 to 3 to remove the unauthorized construction from the premises in question; clear the construction material, debris, garbage; *and* repair the damaged and inundated road in front of the premises in question. A direction is also sought to respondents no.4 to 6 to remove/demolish any unauthorized construction or encroachment on the public land, footpath and road in the premises in question. A further direction is also sought to respondent

Signature Not Verified
Digitally Signed
By:AMULYA

6

by respondents no.1 to 3.

2. Pleadings in this matter are complete. With the consent of counsel for the parties writ petition is set down for final hearing and disposal.
3. The necessary facts, to be noticed for disposal of the present writ petition, are that the petitioner is a resident of Jamuna Marg, Civil Lines, Delhi. Respondents no.1 to 3 are also residing at Jamuna Marg, Civil Lines, Delhi. As per the writ petition, somewhere in the end of year 2010 respondents no.1 to 3 started construction over their premises bearing no.10, Jamuna Road, Civil Lines, Delhi, afresh.
4. It is the case of the petitioner that while constructing the premises afresh respondents no.1 to 3 have started shifting the boundary wall in front of (Jamuna Road) and side lane of Jamuna Road by about 6-7 feet towards the public road, thus, encroaching and reducing the width of the footpath on the main road (Jamuna Road) and width of side lane (Jamuna Lane). As per the petitioner, there is a danger of collision for vehicles coming from Jamuna Road and Jamuna Lane as the same has become a bind alley. The petitioner has been writing to various authorities since January, 2011, informing them about the illegal acts carried out by respondents no.1 to 3.
5. The complaint of the petitioner is that no action has been taken by any of the authorities to stop the illegal encroachment by respondents no.1 to 3 on public land. A prayer in this writ petition was also made with regard to cutting of trees, however, the petitioner had made a statement that he does not wish to press prayer no.5 and consequently respondent no.7, Forest Department, was deleted from the array of parties.
6. It has also been stated in the writ petition that the petitioner is not really aware about the illegal construction inside the premises, however, after the approval of the building plan on 18.10.2010 respondents no.1 to 3 modified the building plans and included the extended boundary wall line

LA

although the modified plans were not approved by the MCD. Respondents no.1 to 3 have illegally extended the boundary wall. Strong reliance has been placed by counsel for the petitioner on the minutes of the meeting of the Building Plan Committee, held on 8.8.2011, more particularly Item No.10 as per which it was decided that the boundary wall would be maintained in the present proposal and at the same location as was existing in the earlier structure. It was further decided that an affidavit would be submitted by the applicant (respondents no.1 to 3) to hand over the remaining land coming in the right of way free of cost as and when required by the Corporation, however, a concession was granted to respondents no.1 to 3 that they may avail FAR on the area of the plot shown outside the boundary wall. The revised building plans were to be processed subject to other corrections and compliances.

7. Mr.Goyal, learned counsel for the petitioner, submits that respondents no.1 to 3 have erected a boundary wall, which is beyond the size of the plot; the boundary wall is on the public land and, thus, respondents no.1 to 3 have encroached upon the public land, whereas respondents no.4 and 5 have been mere spectators, who have allowed respondents no.1 to 3 to encroach upon the public land.
8. Respondents no.4 and 5 have filed a status report and a short affidavit. As per the status report dated 30.8.2012, it is stated that the building plans of the subject property were sanctioned by the Building (IIQ), MCD, vide no.73/A/IIQ/2010. Further, as per the status report, the owner/builder has made certain compoundable deviations during construction and on the request of the owner the property has been regularized after compounding charges were paid. A categorical assertion has been made by respondent no.4 in the status report that on inspection it was found that neither there is any unauthorized construction nor any deviation against the regularized

7

building plan at the site. While addressing the issue on the question of boundary wall the following assertions have been made in the status report:

“5. That the owner has constructed boundary wall within his plot premises and hence, there is no encroachment on public land, as well. However, the boundary wall has been constructed at the site within the plot line. This aspect has been technically examined, which revealed that the same is permissible under 6.41(g) of the Building Bye-Laws 1983.”

9. Pursuant to the directions passed by this Court, the MCD has filed another affidavit of Mr.A.K. Singh, Executive Engineer (Building), Civil Lines Zone, NDMC, dated 30.1.2013. The affidavit has reiterated what has been stated in the status report dated 30.8.2012, which has been filed. It was, however, pointed out that the regularization application of respondents no.1 to 3 was processed and constructed was regularized under the orders of the competent authority after respondents no.1 to 3 deposited the compounding charges of Rs.8,92,390/-. As per this affidavit after regularization the owner/builder made some deviations in the position of boundary wall against the sanctioned building plan. Thus, the property of the petitioner was booked vide file no.115/C-77/B/UC/CLZ/2012 dated 9.7.2012 and a show cause notice no.18744 dated 9.7.2012 was served upon respondents no.1 to 3. Thereafter an FIR was lodged against respondents no.1 to 3. Reply to the show cause notice was filed wherein respondents no.1 to 3 had clarified that the boundary wall is positioned on its boundary line since the year 1980 vide MCD sanctioned plan no.252/01/IIQ/79. Respondents no.1 to 3 were also afforded an opportunity of personal hearing and thereafter the show cause notice dated 9.7.2012 was withdrawn by an order dated 14.8.2012. It has also been stated on affidavit that on inspection by the field staff, it has been noted

8

that the owner has constructed the boundary wall within his premises and plot line. Hence, there is no encroachment on the public land and, thus, this aspect has been technically examined and the examination has revealed that the construction of boundary wall is permissible under Clause 6.4.1(g) of the Building Bye-Laws, 1983.

10.A detailed affidavit has been filed by respondent no.3, who is also represented through counsel. It is contended by Mr.Sapra, learned senior counsel for respondents no.1 to 3, that the present petition suffers from *suppressio veri* and *suggest falsi* as the petitioner is well aware that there is no encroachment on the public land. It is further stated that the present writ petition is mala fide, vexatious and is, thus, liable to be dismissed. It is further stated by Mr.Sapra that respondent no.3 is the lawful owner of the property in question and he has carried out the construction of a residential house in conformity with the building bye-laws, the provisions of Delhi Municipal Corporation Act and the MPD 2021. It is categorically stated in the reply affidavit that no unauthorized construction or encroachment upon the public land has been made. Respondent no.3 had reconstructed the boundary wall on the earlier boundary wall, which was in existence and moreover no part of the plot of respondents no.1 to 3 has ever been acquired nor any acquisition proceedings have been initiated by respondents no.1 to 3. It is further submitted that the petitioner only wants to pressurize respondent no.3 to surrender part of its private property so that the existing road can be widened for the purposes of parking of guests of the neighbours and various baseless complaints have been made to the Police and other civic agencies to harass respondents no.1 to 3. It has also been stated by Mr.Sapra that respondent no.3 was not interested in surrendering his land to avail an additional FAR and, thus, he did not accept the offer of the MCD, which is evident from the fact that he has not

P

taken any benefit of the additional FAR and more so a completion certificate has been awarded by the MCD to respondent no.3, which leads to a conclusive finding that there is no unauthorized construction or encroachment by respondent no.3 on the public land. It is further contended by Mr.Sapra that based on the complaint made by the petitioner a show cause notice was issued to respondent no.3; a detailed reply was filed; and after hearing the parties, the show cause notice was withdrawn by an order dated 14.8.2012. Senior counsel further contends that even otherwise after the filing of the writ petition the MCD has again satisfied itself that there is no encroachment on the public land and further there is no unauthorized construction by respondent no.3. Respondent no.3 has, thus, prayed that the writ petition be dismissed with exemplary costs for harassing respondents no.1 to 3 and for wasting a precious time of the Court.

11. Learned counsel for the petitioner while relying upon a decision rendered by the Apex Court in the case of *M/s Gobind Pershad Jagdish Prasad v. New Delhi Municipal Committee*, reported at (1993) 4 SCC 69 submits that in case the land has been surrendered by the owner for the benefit of the public, the same would no longer remain under the control of the owner and the owner would have no right at any time to prevent the public from using the same.
12. Learned senior counsel for respondents no.1 to 3 have relied upon a decision rendered in the case of *Madan Lal Gupta v. Municipal Corporation of Delhi & Ors.*, reported at 122 (2005) DLT 706 more particularly paras 7 and 10, which read as under:

“7. It has been further submitted that the demand of 10% area of each sub-divided plot towards community facilities is not permissible in the light of the judgment of the Hon'ble Supreme

b

Court in , Pt. Chet Ram Vashisht (dead) by L.Rs., v. Municipal Corporation of Delhi, which held as follows:-

"None of its provisions entitled the Corporation to claim any right or interest in the property of the owner. Sub-section (3) empowers the Standing Committee to accord sanction to the lay-out Plan on such conditions as it may think fit. The expression, 'such conditions' has to be understood so as to advance the objective of the provision and the purpose for which it has been enacted. The Corporation has been given the right to examine that the lay-out plan is not contrary to any provision of the Act or the rules framed by it. For instance a person submitting a lay out plan may be required to leave certain open space or he may be required that the length and width of the rooms shall not be less than a particular measurement or that a coloniser shall have to provide amenities and facilities to those who shall purchase land or building in its colony. But the power cannot be construed to mean that the Corporation in the exercise of placing restrictions or imposing conditions before sanctioning a lay-out plan can also claim that it shall be sanctioned only if the owner surrenders a portion of the land and transfers it in favor of the Corporation free of cost. That would be contrary to the language used in the Section and violative of civil rights which vests in every owner to hold his land and transfer it in accordance with law. The resolution passed by the Corporation directing the appellant to transfer the space reserved for tube wells, school and park in its favor free of cost was depriving the owner of its property and vesting it in the Corporation against law. The finding of the High Court that such condition did not amount to transfer of ownership and only it was only a transfer of the right of management cannot be accepted. The two rights, namely, of ownership and of management, are distinct and different rights. Once a vacant site is transferred in favor of another free of cost then the person transferring it ceases to be owner of it. Whereas in transfer of right of management the ownership continues with the person to whom the

11

property belongs and the local authority only gets rights to manage it. But the conditions imposed by the Standing Committee clearly meant to transfer the ownership in favor of the Corporation. The Corporation as custodian of civil amenities and services may claim and that would be proper as well, to permit the Corporation to regulate, manage, supervise and look after such amenities but whether such a provision can entitle a Corporation to claim that such property should be transferred to it free of cost appears to be fraught with insurmountable difficulties. The law does not appear to be in favor of the Corporation. Public purpose is, no doubt, a very important consideration and private interest has to be sacrificed for the welfare of the society. But when the appellant was willing to reserve the two plots for park and school then he was not acting against public interest. This cannot be stretched to create a right and title in favor of a local body which utmost may be entitled to manage and supervise only."

10. The permissions being granted to the properties less than half an acre leading to hostile discrimination against the petitioner has not been denied in the pleadings or even during submissions in Court. Even de-hors the said un rebutted plea of discrimination, the petitioner in my view is entitled to succeed. The petitioner clearly falls within the respondent's own guidelines but for the involuntary deduction ought to be made from the area owned by the petitioner on the basis of 10% free of charge area for community facilities. In my view as per the law laid down by the Hon'ble Supreme Court in Pt. Chet Ram's case (supra), it would not be open to the MCD to acquire such an area for community purposes free of charge and if at all the MCD wanted it for the public purposes, the proper course under Land Acquisition Act ought to have been followed. The Hon'ble Supreme Court has held in the above judgment that such compulsory acquisition is beyond the powers of Delhi Municipal Corporation."

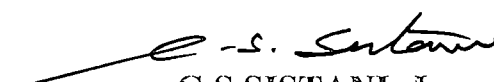
13. Mr.Sapra further submits that the Single Judge in para 7 of the *Madan Lal Gupta* (supra) has strong placed reliance on a decision of the Apex

Court in *Pt. Chet Ram Vashisht (dead) by L.Rs. v. Municipal Corporation of Delhi*, reported at 1995 SCC 430.

14. I have heard counsel for the parties and also considered their rival submissions. The submission of counsel for the petitioner is firstly that respondents no.1 to 3 have carried out unauthorized construction and consequently encroached upon the public land. The second submission of counsel for the petitioner is that the foot path has been reduced by constructing a boundary wall by respondents no.1 to 3. As far as the MCD is concerned a categorical stand has been taken that there is no unauthorized construction over the property in question. All deviations are compoundable in nature and on payment of Rs.8,92,390/- the deviations sought were compounded. The MCD has further taken a stand that the complaint made by the petitioner was taken note of and consequent to the complaint a show cause notice was issued on 9.7.2012 and upon hearing the parties the show cause notice was withdrawn. It is not clear from the submissions made by counsel for the petitioner as to whether respondents no.1 to 3 have encroached upon the public land or whether respondents no.1 to 3 had decided to give a part of their plot. Although reliance is placed on the minutes of the meeting dated 18.8.2011 to show that in case respondent no.3 gave up his part of the land he would be compensated by availing FAR on the area of the plot shown outside the boundary wall. The MCD has made another categorical assertion in the reply affidavit that the boundary wall has been erected by respondents no.1 to 3 within their plot. Thus, it can safely be said that there is no unauthorized construction or encroachment on the public land as stated by the petitioner. Even otherwise a bare reading of Clause 6.4.1(g) of the Building Bye-Laws, 1983, as applicable to Delhi and the area under the MCD jurisdiction shows that for construction or re-construction of

boundary walls as permissible under these Bye-Laws no notice or building permit is necessary under law.

15. The affidavit of the MCD has also clearly stated that the boundary wall has been re-erected by respondents no.1 to 3 as per their boundary line. The judgment, sought to be relied upon by counsel for the petitioner in the case of *M/s Gobind Pershad Jagdish Prasad* (supra), is not applicable to the facts of the present case as the aforesaid matter deals with viranda in front of the shop, which has been in existence for more than two decades. When the said matter had come up before the Apex Court the stand of the shop keepers was rejected to take over the viranda, which was being used as a passage by the owners. The facts in the present case are different to the extent that the petitioner has prayed that respondents no.1 to 3 should in fact be directed to surrender a part of their land so that the width of the pavement is not decreased. Without acquiring the land the Government cannot force a citizen to part with his property nor the MCD has made any such suggestion. In my view the present writ petition is misconceived and the same is accordingly dismissed with costs of Rs.5,000/-, each, to be paid by petitioner to respondents no.1 to 5.


G.S.SISTANI, J

APRIL 08, 2013
msr