

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

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Date of decision: 11th March, 2014

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CS(OS) 2045/2008

ASHOK KAPOOR & ORS

..... Plaintiffs

Through: Mr. Jasmeet Singh with Ms. Kritika Mehra, Advs.

Versus

MUNICIPAL CORPORATION OF DELHI

..... Defendant

Through: Mr. Rahul Srivastava for Ms. Suparna Srivastava, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The seven plaintiffs have filed the present suit, pleading;
 - (i) that the seven plaintiffs are residents of their respective houses on Khajoor Road, Karol Bagh, New Delhi and which stretch of road is barely 200 meters long;
 - (ii) that the plaintiffs are owners / possessed of or otherwise sufficiently entitled to their respective properties on the said road;
 - (iii) that the right of way of Khajoor Road has always been 80 ft., as is evident from Notification No.13/46/2006-ud/16071 dated 15th

September, 2006 read with Corrigendum S.O. 1511 (E) dated 14th September, 2006 notifying the right of way of Khajoor Road as 24 meters i.e. 80 ft.;

- (iv) that as per the Delhi Development Authority (DDA), the right of way means the distance between property line to property line on either side of the road;
- (v) that in front of each house on Khajoor Road, on both sides of the road, beyond the right of way is a parcel of land which has been leased to each of the house owners as a “grassy plot”; the lease in respect of grassy plots of the plaintiffs is valid and subsisting;
- (vi) that the grassy plots falling in between the row of houses and the right of way are kept open to the sky and the residents have been using the grassy plot in front of their respective houses for keeping plants, flower pots etc.;
- (vii) that each of the plaintiffs has been in exclusive possession and enjoyment of the grassy plots in front of his house, to the exclusion of the defendant MCD;

- (viii) that the defendant MCD has not been exercising any control over the said grassy plots;
- (ix) though the defendant MCD termed the plaintiffs as “licencees” of the said grassy plots but the same is of no avail since the plaintiffs are in exclusive possession of the grassy plots in front of their respective houses;
- (x) that from the year 1985-86 the defendant MCD had not raised any demand for rent / use and occupation charges also of the said grassy plots from any of the residents on the said road, though the plaintiffs have always been ready and willing to pay the same;
- (xi) that in the second week of March, 2008 the plaintiffs learnt that the defendant MCD was planning to concretize the grassy plots in front of their respective houses and make pavement thereon, though a pavement already exists;
- (xii) that while the plaintiffs were attempting to elicit information from the defendant MCD under the Right to Information Act, 2005 (RTI Act) qua the position of the said grassy plots, the

defendant MCD attempted to carry out demolition, laying of pavement / road on the grassy plots aforesaid in front of the houses of the plaintiffs, claiming the right of way Khajoor Road to be of 100 ft.;

- (xiii) that ultimately the plaintiffs, in reply to their queries under the RTI Act were informed of the proposal of the defendant MCD of construction of new footpath at the extreme outer edge of right of way of the road, to avoid encroachment;
- (xiv) that though the plaintiffs had filed W.P.(C) No.5910/2008 in this regard but upon the Bench expressing the view that the questions arising for adjudication would require evidence, the said writ petition was withdrawn to file the instant suit;
- (xv) that the plaintiffs were put in possession of the grassy plots by the defendant MCD itself more than 40 years prior to the institution of the suit and the plaintiffs could not be deprived of possession of the grassy plots without due process of law; and,
- (xvi) even otherwise nobody can be dispossessed without following the due process of law.

accordingly the reliefs of, (a) declaration that the right of way of Khajoor Road which include the pavement and excludes the grassy plots, is 80 ft.; (b) declaration that the defendant MCD is bound by the Notification aforesaid whereby the right of way of Khajoor Road is 80 ft.; (c) declaration that the Resolution No.21 dated 30th April, 1949 of the Building Committee did not determine the right of way of Khajoor Road; (d) declaration that lease in respect of grassy plots is valid and subsisting; (e) mandatory injunction directing and commanding the defendant MCD not to disturb the right of way of Khajoor Road as 80 ft.; and, (f) for permanent injunction restraining the defendant MCD from dispossessing the plaintiffs from the grassy plots in front of their houses except by due process of law, were / are claimed.

2. Summons of the suit and notice of the application for interim relief were issued to the defendant MCD and vide *ex parte ad interim* order dated 26th September, 2008 the defendant MCD and its employees were restrained from demolishing the boundary walls and from taking away the use of the grassy plots in front of the houses of the plaintiffs.

3. The defendant MCD has contested the suit by filing a written statement, *inter alia* on the grounds:-

- (a) that the width of Khajoor Road as per Resolution No.21 dated 30th April, 1949 of the Building Sub Committee is 99 ft.;
- (b) that the owners of the houses on either side of the Road have however encroached upon the Municipal land and the right of way of Khajoor Road;
- (c) that *Tehbazari* fees was recovered from only one of the residents of Khajoor Road, under Section 321 of the Delhi Municipal Act, 1957 (DMC Act) with respect to the grassy plot, upon noticing the encroachment thereof;
- (d) that the plaintiffs also along with their plaint have not enclosed any latest *Tehbazari* Receipt with respect to the grassy plots;
- (e) except for the year 1985 when encroachment fee up to 1985 was received, no *Tehbazari* also had been collected and the defendant MCD has not given any permission to use Municipal land and the plaintiffs are in encroachment thereof;

- (f) that no lease, in favour of any of the residents, of the grassy plots was ever created; rather being Municipal land it cannot be let out in any manner whatsoever;
- (g) in fact encroachments were removed by the defendant MCD in the month of July, 2007; and,
- (h) that no notice is required to be given for action under Sections 320 and 321 of the DMC Act for removal of encroachment from Municipal land.

4. The suit has been languishing for the last nearly six years without even the *ex parte ad interim* injunction granted in favour of the plaintiffs being confirmed.

5. The suit came up before this Bench on 6th March, 2014 when it was found to be ripe for framing of issues. On perusal of the claim of the plaintiffs, it was found to be *prima facie* misconceived and it was observed that even proper parties had not been impleaded, as MCD is merely in management of lands which otherwise belong to the Union of India (UOI) and the claim of the plaintiffs in the suit with respect to the said lands could not be adjudicated in the absence of UOI, which had not been impleaded. On

perusal of the documents filed by the plaintiffs, it was also observed in the order dated 6th March, 2014 that the same did not show the plaintiffs to have any right with respect to the grassy plots in front of their houses and thus the question of putting the suit to trial did not arise. On request of the counsel for the plaintiffs the suit was adjourned.

6. The plaintiffs have since filed IA No.4372/2014 for amendment of the plaint and IA No.4373/2014 under Order 1 Rule 10 of the CPC.

7. The counsels have been heard on the aspect of maintainability of the suit as well as on the said applications.

8. The plaintiffs, vide applications aforesaid seek to implead the Public Works Department (PWD), DDA and the UOI through the Ministry of Urban Development as defendants no.2 to 4 in the suit, pleading that the rights and obligations of the sole defendant MCD qua the suit property stand transferred to PWD which is now in management and maintenance of Khajoor Road; DDA is sought to be impleaded in view of the objections in the written statement of the MCD to the effect that DDA is the only Competent Authority to declare the right of way of Khajoor Road as 30 meters instead of 24 meters; the reason pleaded for impleadment of UOI is

that the Zonal Development Plan is prepared by the Ministry of Urban Development. Amendments consequential to impleadment of the defendants are also sought to be made in the plaint.

9. The plaintiffs would be entitled to the relief of permanent injunction, restraining, whichever Governmental / Municipal Agency may be the concerned agency, from dispossessing the plaintiffs from the grassy plots in front of their houses, only if plead and prove a right to the said grassy plots in front of their houses. The other reliefs claimed in the plaint, of declaration qua the right of way of Khajoor Road and qua various Notifications and Resolutions, are only in aid of the main relief claimed in the suit of the right of the plaintiffs to the said grassy plots in front of their respective houses. Else, it is not the case of the plaintiffs that they otherwise are affected by the dimensions of the right of way of Khajoor Road. The plaintiffs have raised the issues of dimensions of right of way of Khajoor Road only to lay a claim to the said grassy plots.

10. However, the dimension of the right of way of Khajoor Road, in my view is immaterial. Whether the size / dimension of right of way of Khajoor Road be 80 ft. as pleaded by the plaintiffs or 100 ft. as pleaded by the

defendant MCD, the same would not vest any right in the plaintiffs in the excess land even if any between the boundaries of the said right of way and the houses of the plaintiffs, unless the plaintiffs establish a right thereto.

11. The core question thus for consideration in the present case is whether the pleadings of the plaintiffs disclose any right of the plaintiffs to the said grassy plots and whether the said pleas are required to be put to trial. It cannot be lost sight of that the suit has already remained pending for nearly six years, without even issues being framed therein and in all these six years the defendant MCD has remained restrained from demolishing the boundary walls which the counsel for the plaintiffs admits, each of the plaintiffs have constructed around the grassy plots in front of their houses and from taking over possession of the said grassy plots, which undoubtedly are public lands, whether for the purpose of increasing the width of Khajoor Road or for the purpose of constructing / developing a concretized pavements / berms on the sides of the said Khajoor Road.

12. When we see the controversy in this light, I am afraid, the plaint does not disclose any right whatsoever of the plaintiffs to the said grassy plots qua which the relief is claimed in the suit.

13. The counsel for the plaintiffs admits that the title documents of the house of each of the plaintiffs do not include the said grassy plots. Rather the plaintiffs have shied away from filing the documents of title of their respective houses and which if filed, would normally have described the boundaries of the houses of the plaintiffs and in describing which the description of the land on the side where the grassy plots are situated would have shown the ownership / use thereof. Adverse inference has to be drawn against the plaintiffs for having not filed the said documents, though the stage therefor has gone.

14. The plaintiffs in para No.3 of the plaint have pleaded that the said grassy plots have been leased to each of the house owners and that the said lease is subsisting. Neither the date on which the said lease was granted is stated nor is it pleaded as to who granted the said leases and in whose favour and on what terms. A lease is a contract and when the very existence of the contract is denied, it is incumbent upon the person claiming a contract to plead facts to prove which evidence may be permitted to be lead to establish such a contract.

15. As aforesaid, MCD is not the owner of such lands as has been held by the Supreme Court in *Municipal Board, Mangalur Vs. Mahudeoji Maharaj* (1965) 2 SCR 242 and reiterated in *State of U.P. Vs. Ata Mohd.* (1980) 3 SCC 614. It was held that when a street is vested in the Municipality, such vesting does not transfer to the Municipality the rights of the owner which continue to stand in the State; the Municipality only has the exclusive right to manage and control to the extent necessary to adequately maintain the street and to bring action against trespassers. The defendant MCD is thus only in management of the said lands. The counsel for the plaintiffs has been unable to show the right if any of the MCD to lease out the said land.

16. The defendant MCD which is claimed to have granted the lease, is a statutory body constituted under The Delhi Municipal Corporation Act, 1957 and Section 202 whereof prescribes the procedure for making contracts. The same provides, that every such contract on behalf of the defendant MCD shall be made by the Commissioner and no such contract which requires the sanction of the MCD or some other municipal authority shall be made without such approval or sanction. Section 203(2) provides that no contract which is not made in accordance with the provisions of the Act and the bye-laws shall be binding on the MCD. Similarly, Section 200, while providing

for the disposal of the property of the MCD, in Clause (b)(ii) thereof provides for the grant of a lease of any immovable property belonging to the MCD only with the sanction of the Standing Committee of the MCD. It further provides that the consideration for which any immovable property may be sold, leased or otherwise transferred shall not be less than the value at which such immovable property could be sold, leased or otherwise transferred in normal and fair competition. It is not pleaded by the plaintiffs that the said contracts of lease alleged to have been granted by the defendant MCD were granted by the Commissioner or that there was any sanction of the Standing Committee of the MCD therefor or as to what was the rate of rent settled or whether the said rent settled was a fair rent for the land. In the absence of such pleadings, it has but to be presumed that the contract alleged of lease was not made in accordance with the provisions of Sections 200 to 202 (*supra*) and thus the contract even if any of lease as alleged by the plaintiffs, would not be binding on the MCD.

17. Once, it is found that the contract of lease alleged by the plaintiffs even if held to exist, is not binding on the defendant MCD, no question of putting the suit to trial to prove the existence of such a contract arises.

18. I may also mention that the plaintiffs, in support of their case, have filed, (i) a receipt dated 30th March, 1985 issued by the MCD of payment of Rs.90.70p in the name of one Sh. Roshan lal (who is not the plaintiff) towards tehbazari of open flower bed upto 31st March, 1985; (ii) a copy of the reply of the MCD to the letter dated 2nd March, 1967 of Sh. Sohal Singh / Gajinder Singh (Sh. S. Gajinder Singh is plaintiff No.3) at the address of 333, Khajoor Road (the address given in the memo of parties of the plaintiff No.3 Sh. S. Gajinder Singh is 16/333, Khajoor Road, Karol Bagh, New Delhi) with the subject “Encroachment-Permission for under Section 321” granting permission to encroach upon 30 ft. x 15 ft. of street with effect from 1962-63 in front of building No.333 situated at Khajoor Road subject to the conditions given on the reverse of the said reply and on payment of Rs.259.98p for the periods 1962-63 to 1967-68. The conditions mentioned on the reverse of the said reply are as under:

- “1. Permission for encroachment shall be purely temporary.*
- 2. No structure, temporary or permanent and of whatever material will be permitted to be set up, nor the site will be covered by any project on. A fencing or a compound wall of such design and of such material as has been specified here in after will, however be permissible.*

3. *The fencing shall be of barbed or round wire supported by angle-irons, or of wire-netting or of hedges.*
4. *The encroachment shall ordinarily be permitted in the form of a lawn or flower-bed, but paving of site may also be permitted on application provided that the paving shall not be in the form of a platform.*
5. *In no case any portion of the storm water drain passing through any part of the strip beyond the building line shall be permitted to be filled up or covered or rendered inaccessible for purposes of cleaning etc.*
6. *The encroachment so permitted shall in no case be taken into consideration as open space for purposes of calculating the permissible coverage under the Building Byelaws, nor it shall be taken in account for purposes of set-backs, nor it shall be included in the plot owned or occupied by the applicant.*
7. *A fee of Rs.1/- per square yard per annum for the space encroached upon shall be payable in advance by the licensee, and in the event of non-payment of such fees in advance the encroachment shall be deemed as unauthorized for which action under Section 322 will be taken without notice.*

8. *The permission shall be liable to be revoked in the event of a breach of any of the conditions subject to which it has been given.*
9. *Irrespective of the conditions subject to which permission has been given, the permission will be liable to be withdrawn if the space encroached upon or any portion thereof is required for any public of a drain, laying of sewer or water main, providing a stand for vehicles, laying of cables for street-lighting, etc. In the event of such withdrawal, the licensee shall within the time specified in the notice remove the entitled to any compensation whatsoever. The fee for the unexpired period of the year shall however, be refundable.”*

19. The plaintiffs have also filed notice dated 11th March, 1983 of the defendant MCD to the aforesaid Sh. Sohal Singh which also suggests that the grassy plot was allotted to him out of municipal land on payment of tehbazari fee and demanding the tehbazari fee due from him. The plaintiff has also filed receipt dated 20th February, 1984 issued by the MCD in the name of the aforesaid Sh. Sohal Singh for Rs.160/- towards tehbazari for open grassy flower bed up to 31st March, 1984.

20. The documents filed by the plaintiffs themselves thus do not bear out the case of the plaintiffs, of being lessees of the said grassy plots.

21. Though the counsel for the plaintiffs has referred to *Associated Hotels of India Ltd. Vs. R.N. Kapoor* AIR 1959 SC 1262 and *Municipal Corporation of Delhi Vs. Pradip Oil Corporation* 100 (2002) DLT 442 (FB) to contend that the question, whether a transaction is of lease or licence is a mixed question of fact and on the basis thereof has contended that the suits have to be necessarily put to trial, but once the documents filed by the plaintiffs themselves do not bear out a case pleaded of lease and clearly show the transaction to be a mere tehbazari or a licence, I fail to see why the suit should be put to trial. This Court in *Ram Raj Chaurasia Vs. Ram Bakshi* MANU/DE/2977/2011 has held that Tehbazari is a combination of two words i.e. “Teh” + “Bazari”, meaning thereby, to utilize surface for the purpose of commercial activity and it does not create interest in the land but to utilize the same, which amounts to license.

22. Faced therewith, the counsel for the plaintiffs has referred to the order dated 15th September, 2011 of the Division Bench of this Court in RFA (OS) No.9/2010 titled *Guru Tilak Vyayamashala Vs. Delhi Development*

Authority and which in turn relies on ***Alka Gupta Vs. Narender Kumar Gupta*** (2010) 10 SCC 141 to contend that in view of the averments made in the plaint, the suit cannot be dismissed at the stage of admission itself.

23. Whether a case for putting the suit to trial is made out or not depends upon the pleadings of each case. Merely because, on the basis of the pleadings in one case it has been held that the suit could not have been dismissed and should have been put to trial cannot be a precedent for putting a suit, from the pleadings wherein itself no right in law is established, to be put to trial.

24. The counsel for the plaintiffs has lastly contended that the plaintiffs being in settled possession, the said possession even if unauthorized ought to be protected and possession can be taken by following the due process of law only. Reliance in this regard is placed on ***Deep Chand vs. Kulanand Lakhera*** 140 (2007) DLT 765.

25. The Supreme Court in ***S.P. Chengalvaraya Naidu Vs. Jagannath*** AIR 1994 SC 853 has held that today the Courts are inundated by land grabbers, tax evaders and other unscrupulous persons from all walks of life and time has time for the Courts to respond appropriately. Similarly, in

Dalip Singh Vs. State of U.P. (2010) 2 SCC 114 it was held that to meet the challenge passed by the new creed of litigants who shamelessly resort to falsehood and unethical means, the Courts from time to time have to evolve new rules. Unless the Courts keep pace with the times and with the situations which they are called upon to meet today, the Courts would be failing in their duty. Hon'ble Mr. Bhagwati J. in ***Bandhua Mukti Morcha Vs. Union of India*** 1984 (3) SCC 161 echoed the same sentiment by observing that in the center of a social order changing with dynamic pace, the Court needs to balance the authority of the past with the urges of the future.

26. Once it is found that the case pleaded by the plaintiff is patently false as per the documents filed by the plaintiffs themselves, and that the plaintiffs are grabbers of and encroachers over public land, I fail to see as to why the Court should come to the rescue of such plaintiffs. It cannot be lost sight of that the plaintiffs are seeking the relief of permanent injunction against their forcible dispossession. The Courts while granting injunctions albeit temporarily have besides the ingredients of *prima facie* case, balance of convenience and irreparable loss and injury have also applied the test of public interest. The grant of the relief of permanent injunction also being a

discretionary one, I fail to see as to why the said test of public interest be not applied at the stage of grant of permanent injunction also. When we look at the matter in this light, what emerges is that protecting the possession of the seven plaintiffs is to the prejudice of millions of other residents of the city who are also to be served by the defendant MCD and other governmental agencies. Allowing the plaintiffs to continue usurping public land amounts to depriving the other citizens from use of the said open space, whether for a wider road or for use as a pavement / berm along with the road.

27. Reference in this regard may again be made to the judgment of ***S.P. Chengalvaraya Naidu*** supra laying down that a person whose case is based on falsehood has no right to approach the Court and can be thrown out summarily; non-production and even non-mentioning of a material document was held to be tantamounting to playing a fraud on the Court. It is the settled principle of law, that a party guilty of suppression of material facts (***Hanamantha Ranoji Vs. Sri Mahadev Channabasappa*** (2000) 6 SCC 120), a party who approaches the Court with a pair of dirty hands (***Mohammedia Coop. Building Society Ltd. Vs. Lakshmi S. Coop. Building Society Ltd.*** (2008) 7 SCC 310) is not entitled to the relief which is discretionary.

28. I have during the hearing also invited the attention of the counsel for the plaintiffs to the judgment of the Full Bench of this Court in ***Chandu Lal Vs. Municipal Corporation of Delhi*** AIR 1978 Delhi 174 holding that a licensee has no right to retain possession and would not be entitled to injunction against eviction and that reasonable force can be used for eviction of the said licensee.

29. The plaintiffs as per their own documents, even if granted tehbazari of the grassy plot in front of their house were not entitled to include the said grassy plots within the compound of their house as they claim to have done.

30. The plaintiffs having indulged in illegal act, this Court cannot become privy to continuation thereof.

31. Section 2(57) of the Delhi Municipal Corporation Act, 1957 defines a street as including any way, road, lane, square, court, alley, gully, passage, whether a thoroughfare or not and whether built upon or not, over which the public have a right of way and also the roadway or footway over any bridge or causeway. It is thus evident that 'street' has wider definition than a right of way and would also include the pavements, berms along with the street as well as lane abutting the street and till the set back of the buildings abutting

the streets. The Supreme Court, in *Ata Mohd.* supra also reiterated that side lands are also included in the public way.

32. The said land is thus to be dealt with in accordance with Chapter XV of Delhi Municipal Corporation Act containing Sections 298 to 330 and under which also there is no requirement for taking legal recourse for removal of encroachment on the street.

33. In that view of the matter, I fail to see what purpose would be served, even if the applications filed by the plaintiff under Order I Rule 10 of the CPC and / or for amendment of the plaint were to be allowed.

34. The suit as well as the applications are accordingly dismissed. Each of the plaintiffs is further burdended with costs of Rs.25,000/- payable to the defendant MCD within one month of this order as exemplary costs for filing a false case and for compensating the defendant MCD for the period of interim stay in this suit, which now, on dismissal of suit, stands vacated.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

MARCH 11, 2014

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(corrected & released on 29th March, 2014)