

\$~22

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

+ **W.P.(C) 1328/2008**

BRIJ VIVEK GUPTA (HUF) & ORS.

..... Petitioners

Through: Mr. Sumit Bansal, Mr. Ateev Mathur,
Ms. Richa Oberoi & Ms. Jagriti
Ahuja, Advs.

versus

M.C.D.

..... Respondent

Through: Mr. Sanjay Poddar, Sr. Adv. with
Mr. Mukesh Gupta, Adv. for MCD.

%

Date of Decision: 21st July, 2015

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present writ petition has been filed with the following prayers:-

“(a) issue a writ of declaration declaring the act of the Respondent Corporation in proceeding to demolish the portion of the property of the Petitioners, is totally illegal, arbitrary and without any authority of law and

(b) issue a writ of mandamus thereby directing the Respondent corporation not to take any action or interfere with the possession and enjoyment of the Petitioners in respect of the property, being plot No.182, measuring 202.5 Sq. Yds. Shama Prasad Mukerji Park, New Delhi;

and

- (c) *pass such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."*

2. It is the case of the petitioners that as the petitioners are the owners of the land in question and they had carried out construction in accordance with the sanctioned plan, their properties could not have been demolished.

3. Learned counsel for the respondent-Corporation states that it has only removed encroachments and unauthorised construction on public road carried out by the petitioners, in compliance with the directions of a Division Bench of this Court to make the Chand Nagar, Punjabi Market Road 45 ft. wide. The relevant portion of the counter-affidavit filed by the respondent-Corporation is reproduced hereinbelow:--

"3. That accordingly the unauthorized construction/encroachment has been removed on both sides of the road in accordance with the directions passed by the Hon'ble High Court in WPC No.23136/2005 after taking due consideration of the Survey Report submitted by this office in order to give a clear 45 feet road as per the directions of the Hon'ble Division Bench.

4. That the properties on which the Petitioners are laying their claims are situated in stretch of row bearing Nos. 166, 178, 179, 180, 181, 182, 183, 184 at S.P. Mukherjee Park on Chand Nagar, Punjabi Market Road as per the layout plan. It is submitted that there existed unauthorized constructions/encroachments on the public land vide said properties which were removed by the Respondent/MCD in compliance of the directions of the Hon'ble Court in the year 2007 in order to make the road 45 feet wide to ensure a proper space for traffic movement and other emergency services and the encroachment removal action had been

taken out by the MCD as per lay out plan of the area.

5. *That the Hon'ble Court had, while delivering the judgment in the case on 07.03.2007 considered the plea of the shop keepers/owners of Chand Nagar, Punjabi Market Road that they are in possession of the shops in pursuance to legal sale deed/registered papers but the same has been overruled by the Hon'ble Court observing that the sale deed in contravention of Land Reforms Act is null and void."*

4. Upon a perusal of the paper book, this Court finds that the Division Bench of this Court had directed that 45 feet wide road shall be ensured by the respondent authority in Chand Nagar, Punjabi Market Road. Though the admitted position is that the road had been encroached upon, yet it is the case of the petitioners that the encroachment was by occupants of an unauthorised colony on the opposite side of the road and, therefore, the said encroachment should have been removed and not the construction carried out by them. But this fact is not admitted by the learned counsel for the respondent-Corporation. Consequently, this Court is of the view that disputed questions of fact arise for consideration in the present proceedings.

5. At this stage, learned counsel for the petitioners contends that no disputed question of fact is involved as the petitioners have a sanctioned plan in their favour which shows length of their properties as 65 ft. In support of his contention, he relies upon the approved sanction plan.

6. Learned counsel for the petitioners also points out that a Court Commissioner appointed by this Court had furnished a report stating that there was no encroachment on the public land by the petitioners.

7. However, this Court is of the view that as the respondent-Corporation and occupants of the unit on the other side of the road have taken a categorical stand that the petitioners have raised unauthorised construction and have encroached upon the public land, the petitioners would have to step into the witness box and would have to prove their sanctioned plans as well as the fact that their construction was in accordance with law.

8. The Court Commissioner's report, at best, can be a piece of evidence, but it cannot be accepted as a 'gospel truth' as the respondent-Corporation and the occupants of the properties on the other side of the road have the right to challenge the same and to cross examine its author.

9. It is also not understood as to what purpose the relief of declaration would serve without any further relief/remedy. In the opinion of this Court, if the petitioners' allegations are correct, then they deserve to be compensated, which can appropriately be done only in a civil suit.

10. It is pertinent to mention that in a batch of petitions challenging the demolition of properties for widening the same road at Chand Nagar Punjabi Market Road in W.P.(C) 11218/2009; 13343/2009; 10/2010; 255/2010; 2763/2010 and Cont. Cas.(C) 143/2010, a Coordinate Bench of this Court had relegated the occupiers of the properties across the road to file a civil suit after observing as under:-

"16. The questions raised by the petitioner are disputed questions of fact. The identity of the land and the measurements thereof cannot be determined in the exercise of writ jurisdiction. The remedy of the petitioners is by way of a suit or demarcation proceedings in which alone all the said questions can be gone into. I am therefore of the opinion that the writ remedy is misconceived and no purpose will be served in keeping the present petitions pending.

As far as the second query raised is concerned, I am also of the opinion that if a person is aggrieved of an order made in a legal proceedings, his remedy is by way of applying in that legal proceedings only. The Public Interest Litigant at whose instance the order of widening of the road was made has not been impleaded as a party in neither of the petitions. That litigant having obtained the orders in the Public Interest Litigation, the said orders cannot be nullified by filing the petitions such as these. However, the said observations should not be construed as disentitling the petitioners from the relief in the alternative remedies suggested hereinabove. The Division Bench had returned a finding of public land being available for widening of the road to the extent of 45 feet width. The Division Bench had also returned a finding of there being encroachments on the said public land as well and passed order for removal thereof. It would however be for determination in the suit or demarcation proceedings, whether the properties of the petitioners were within the said 45 feet, in which case they have been rightly demolished for widening or beyond the said 45 feet.”

(emphasis supplied)

11. The said order of the Coordinate Bench was upheld by a Division Bench of this Court in LPA No.915/2010. Consequently, it is imperative that present petitioners avail of the same remedy.

12. Accordingly, the writ petition is dismissed with liberty to the petitioners to file a civil suit. The time spent in prosecuting the present writ petition shall be excluded while determining the period of limitation for the said proceeding.

13. Since an interim order has been in operation for quite a few years, this Court extends the interim protection for a period of one month from today.

14. It is made clear that the appropriate forum/Court before whom proceeding is to be filed by the petitioners will decide the case in accordance with law without being influenced by any observation made by this Court.

The rights and contentions of all parties, including the maintainability of the suit, are left open.

With the aforesaid liberty and direction, the present petition is dismissed.

MANMOHAN, J

JULY 21, 2015

nk