

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

+ **W.P. (C) No.4549/2008**

Decided on : 3rd February, 2015

DEFENCE PUBLIC SCHOOL

..... Petitioner

Through: Mr. Pravin H. Parekh, Senior
Advocate with Mr. Sameer Parekh,
Mr. Shashank Kumar and
Mr. Anurag Tripathi, Advocates.

versus

N.C.T GOVERNMENT OF DELHI & ANR.

..... Respondents

Through: Mr. Ajay Verma, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. The present writ petition has been filed seeking following reliefs:

- a) *Writ of mandamus or any other appropriate writ/order/direction etc. directing the respondents not to demolish the school building in question situated at the Defence Enclave Colony, Mahipalpur Extension, New Delhi without following the due process of law and without taking any final decision on the issue of the regularization of the structures in the colony in question namely the Defence Enclave, Mahipalpur Extension in temrs of the order of this Hon'ble Court dated 05.10.2005 in Writ Petition No.4134-*

229 of 2005.

- b) *Appropriate writ order or direction against the respondents prohibiting/restraining them from taking any action against the petitioner's school building situated in the Defence Enclave, Mahipalpur Extension, New Delhi without following the due process of law and without taking any final decision in terms of the aforementioned order dated 05.10.2005."*

2. Briefly stated the facts leading to the filing of the present writ petition are that the petitioner is claiming itself to be a charitable Non Government organization working for the upliftment of the poor and weaker sections of the society. It has been stated that the petitioner/School is imparting free education to the poor and needy people. The aims and objects of the Society are stated to be :

- i) to encourage and assist, organize or undertake and contribute to the community development and social welfare programmes with emphasis on rural areas; and
- ii) to bring general awareness and up to date knowledge of nation/state environment, health and hygiene to the underprivileged people at large and to provide medical relief and education to the poor.

3. It has been stated that the petitioner is running a school built on a plot admeasuring 2000 square yards in khasra No.867/2, village Mahipalpur. It has been stated that the school is a single storeyed building having four class rooms, one office room and one room for peons/store. There are 280 students, children of slum dwellers in the area, who are benefited by receiving quality education being imparted by the petitioner/school at the premises in question. It has been stated that the school is known as Defence Public School and is situated in an unauthorized colony known as Defence Enclave, Mahipalpur, Extension, New Delhi.

4. It has also been stated that the students are being provided free education, uniform, books and mid-day meal by the school without any assistance from any source whatsoever. It is alleged by the petitioner that on 13.06.2008 the officials of the DDA visited the colony in question and threatened to demolish the school on 18.06.2008 because of which they constrained to file the present writ petition.

5. It has been averred that the threatened action of demolition on the part of the respondent No.2/DDA is not only arbitrary, illegal,

discriminatory but is also violative of Article 21A of the Constitution of India which guarantees right to free education up to primary level and hence the present writ petition has been filed claiming the aforesaid reliefs.

6. The court issued notice to the respondents to show cause on 18.06.2008 and directed status quo with regard to the property in question to be maintained. This order of status quo was continued till date. The respondents have filed their counter affidavit and contested the writ petition.

7. The case of the respondents is that the present writ petition claiming protection against demolition action is essentially based by the petitioner/society on the order dated 05.10.2005 passed in the writ petition bearing No. 4134-229/2005. However, it has been stated in the said order, the structures which have come up post 01.04.2002 would not be entitled to any protection. The respondents are free to take action as per law to demolish the said structures which have come up post 1.4.2002. It has also been stated that the land in question is an acquired land in respect of which possession was handed over by the Land and Building Department to the DDA on

11.02.2013 free from any encroachment or any structure. However, the petitioner after handing over of the land to the respondent No.2/DDA have encroached on the said parcel of land and built unauthorized structures. It has also been stated by the respondent No.2/DDA that the petitioner is also not eligible for regularization under the guidelines issued on 24.03.2008 by the Government of India as the policy of regularization is basically framed for regularization of residential structures. In this regard, clause 3.4 has been referred to, which is as under:

Clause 3.4

“no regularization will be done in respect of residential buildings used for non residential purposes except those covered under the mixed land use regulations contained in the MPD-2021 as may be amended from time to time. The time limit of 90 days for conducting survey for notification of mixed used streets as prescribed in clause 15.3.4 of the MPD-2021 in respect of these colonies will commence with effect from the date of notification of the colony as deemed regularized colony by the GNCTD or the date with effect from which the colony shall qualify for regularization.”

8. Accordingly, it is contended that since running of a school is a non residential activity, therefore, the regularization of the same is not

permissible.

9. On the basis of the aforesaid averments, it has been stated that the writ petition of the petitioner is a gross abuse of the process of law and deserves to be dismissed.

10. This aspect has been contested by the petitioner. It has been stated by the petitioner that it had constructed the structure in the year 2000 after purchasing the land in question from one vender Mr.Virender Kumar on 18.07.2000 situated in Khasra No.867/2 on the basis of a General Power of Attorney and other documents of transfer of property. It has also been stated that since the petitioner is providing education to slum dwellers, therefore, the school may not be demolished till the time a view is taken by the Government with regard to the regularization of the colony in question.

11. I have heard the learned senior counsel for the petitioner as well as the learned counsel for the respondent No.2/DDA.

12. The contention of Mr. Parekh, the learned senior counsel for the petitioner, has been essentially two fold.

13. The first contention of Mr. Parekh, the learned senior counsel is that the right to education has been guaranteed as a fundamental right

under Article 21A of the Constitution of India and the petitioner is providing the said right to the under-privileged children of slum in the neighbourhood. It is stated that not only the petitioner is providing free education but it is also providing mid day meal, free books and other amenities to the students and, therefore, the demolition of the structure of the school is going to cause irreparable loss to these under-privileged children from continuing with schooling and they deserve to be protected.

14. The second submission of the learned senior counsel for the petitioner is that even though assuming, not admitting, that the petitioner is illegal possession of the land in question, the respondent No.2/DDA cannot dispossess them except in accordance with the due process of law. They cannot come to the school premises and threaten action of demolition so as the school structure is concerned.

15. In this regard, the learned senior counsel for the petitioner, has copiously referred to various judgments to contend that a person who is admittedly in settled possession of the premises in question, deserve to be protected by the court as the respondent No.2/DDA cannot demolish the school and dispossess the petitioner forcibly.

The learned senior counsel for the petitioner has relied upon the following judgments: i) *Munshi Ram & Ors. v. Delhi Administration*; (1968) 2 SCR 455, ii) *Puran Singh & Ors. v. The State of Punjab*; (1975) 4 SCC 518, iii) *Rame Gowda (Dead) by LRs v. M. Varadappa Naidu (dead) by LRs*; (2004) 1 SCC 769, iv) *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.*; (1993) 1 SCC 645 and *TMA Pai Foundation and Ors. v. State of Karnataka & Ors.*; (2002) 8 SCC 481.

16. The learned counsel for the respondent has contended that the petitioner is a rank trespasser on the government land and the said construction has also been issued after 2002 only and was not protected by the interim order on the basis of which stay order was obtained. It has been stated that bearing khasra No.862/2 measuring three bighas and 17 biswas has been acquired vide award No.34/86-87 and the alleged transaction by the petitioner school is post acquisition which does not vest any right, title or interest in the said land. It is also stated that vacant physical possession was taken by the LAC and thereafter handed over to the DDA on 11.2.2003. The petitioner has trespassed and thereafter raised construction which is

unauthorized after that for which complaints were made with the local police.

17. It has been further stated that the petitioner is trying to cover its misdeeds by the so-called of providing free education to the children of the slum dwellers. As a matter of fact, it is only a ploy to perpetuate its illegal occupation on the government land. It is also stated that this illegal occupation is hampering widening of a public road.

18. I have carefully considered the submissions made by the learned senior counsel for the petitioner as well as the learned counsel for respondent No.2/DDA.

19. It is not in dispute that a school is being run at a parcel of land in respect of which the petitioner does not have any document of title. The document of sale by one Virender Kumar on 18.7.2000 cannot be treated as a document creating any right, title or interest in the suit property when it is an acquired property which vests with the government.

20. The petitioner in the absence of any document of title could not have established a school and claimed protection from the court. As a

matter of fact, the writ jurisdiction is a discretionary jurisdiction of the court and a party, who seeks to invoke the writ jurisdiction must come to the court with clean hands while as, in the instant case, the petitioner is a rank trespasser after the possession of the land was handed over to the DDA by the Land & Building Department after acquisition of the land. Then after encroaching, the petitioner has built an illegal structure and obtained an order of status quo on the strength of another interim order without disclosing that the construction has been raised after 2002.

21. In the instant case, the petitioner has protection against demolition in respects of the structures which admittedly are unauthorized. It is established by preponderance of probability by the respondents that the land in respect of which the petitioner is in occupation and where the school is purportedly being run is an acquired land in respect of which the possession was delivered to the respondent No.2/DDA by the respondent No.1/Land and Building Department of the Govt. of NCT of Delhi way back in the year 2003. Once the possession of the land which was vacant, was delivered to the respondent No.2/DDA, the subsequent encroachment by the

petitioner and erection of the super structure thereon, does not regularize the super structure or the ownership of the land in their favour. Therefore, because of these reasons, I feel that it may not be proper for this court to exercise the jurisdiction in favour of the petitioner by protecting them against any demolition which respondent No.2/DDA are well within their rights to carry out for the purpose of removal of unauthorized construction over the land owned by them.

22. The second submission of the learned counsel senior counsel for the petitioner that the demolition action ought not to be carried out till the time the question of regularization of the unauthorized colony known as Defence Enclave Colony, Mahipalpur Extension, New Delhi is decided by the Govt. of NCT of Delhi, is not tenable in law. This is on account of the fact that the learned counsel for the respondent No.2/DDA has rightly referred to Clause 3.4 of the policy which show that the regularization policy essentially pertains to residential structures and not commercial or non residential structures. Moreover, vide C.M. No.14117/2014, the respondent has already informed the court that the colony in question is also not eligible for

regularisation under Section 33 (c) of the Regulation dated 24.3.2008.

23. The contention of the learned senior counsel for the petitioner that it is not making any profit out of running the school and is doing social service by providing free education, uniform, mid day meals and books, etc. to the under privileged children does not detract from the policy in any manner whatsoever. This is on account of the fact that the petitioner may not be making any profit out of running the school or may be doing so as a part of larger social responsibility or obligation to the society, but certainly this cannot be used as a ground for perpetuating something which is contrary to the regularization policy of the Government of India. The plea that the fundamental right of the children guaranteed under Article 21A of the Constitution of India to provide the primary education is also not violated. The purpose of the respondent is not to violate the right of the children under Constitution of India but only to retrieve its land which has been wrongfully usurped by the petitioner society. A party cannot be permitted to firstly commit an illegality and then perpetuate the same by taking the plea that any fundamental right of the citizen is being violated. A person who is feeling aggrieved on account of any action

of the state is free to get his grievance redressed in law but a third party cannot be permitted to set up this as a defence for action being taken against him.

24. Therefore, in my view, the school being a non residential activity carried out by the petitioner cannot be permitted to be regularized and this prayer of the petitioner in the writ petition that the respondent No.2/DDA should keep its hands off the property till the question of regularization of the colony is question is decided by the Government, is bereft of any merit.

25. The learned senior counsel for the petitioner Mr. Parekh has also relied upon the cases of *Munshi Ram (supra)*, *Puran Singh (supra)* and *Rame Gowda (supra)* in support of his submission that as the petitioner is in settled position of the aforesaid parcel of land, therefore, even though, it may not be successful in getting the requisite relief of injunction against demolition and removal of the school but by virtue of the aforesaid pronouncements, the court must observe that it shall not be dispossessed except in accordance with due process of law or in other words that the possession shall be taken over from it only in accordance with law. In this regard, the learned

senior counsel has contended that the only method in which the possession can be taken is by filing a civil suit and recover the possession.

26. I do not agree with this contention of the learned senior counsel that even though the writ petition may not be maintainable, still the court must observe that for retrieval of possession of the premises in question or carrying out demolition, the respondents are required to go to the court. The reasons for this are that the petitioner knows that in case a suit for possession is filed, it will take the respondents to perpetuate its illegality at least for two decades. It will be a kind of situation that the grass would grow and the house would die. That, in my opinion, is not the purpose of law. A party should not be permitted to reap the benefit of an illegality or to take unfair advantage of a procedure which is dilatory or cumbersome. In this regard, reliance is placed on *Maria Margarida Sequeira Fernandes & Others vs. Erasmo Jack De Sequeira*; (2012) 5 SCC 370 wherein para 80, it has been observed as under :-

“The High Court of Delhi in a case Thomas Cook (India) Limited v. Hotel Imperial held as under:

"28. The expressions `due process of law', `due course

of law' and 'recourse to law' have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed 'forcibly' by the true owner taking law in his own hands. All these expressions, however, mean the same thing -- ejection from settled possession can only be had by recourse to a court of law. Clearly, 'due process of law' or 'due course of law', here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this 'due process' or 'due course' condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the 'bare minimum' requirement of 'due process' or 'due course' of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the 'recourse to law' stipulation stands satisfied when a judicial

determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."

27. So far as the judgments in *Munshi Ram (supra)* and *Puran Singh's (supra)* cases are concerned, to which reference has been made in order to contend that the petitioner was in settled position of the suit premises, the issues which were involved before the Apex Court were pertaining to a criminal trespass of a parcel of a land and the exercise of right of self-defence by the party who was in possession.

28. The Supreme Court in the context of deciding those rights of the parties of self-defence has dealt with the question of settled position, which cannot be made applicable to the facts of the present case. The reason for this is that the Apex Court in its own judgment passed in *Haryana Financial Corporation & Another vs. M/s. Jagdamba Oil Mills & Anr.; (2002) 3 SCC 496* has observed that law cannot be applied like theorems. Before the law which is laid down by the Apex Court in one of the cases is made applicable to the facts of the case in hand, the court must be conscious about the facts of the

two cases and try to correlate the same so as to make the law applicable to the facts of the case in hand. Accordingly, both these judgments in *Munshi Ram (supra)* and *Puran Singh's (supra)* cases are not applicable to the facts of the present case as the question which was involved in both these cases had a different contour and that too under criminal law. So far as the *Rame Gowda's* case is concerned, it is the reiteration of the same principal that a person who is in settled position may not be disturbed except with due process of law.

29. In the instant case, the possession has been wrongly protected by virtue of a court order in another writ petition when it was very much clear in the writ that construction raised after certain date is not protected.

30. I feel since the petitioner has not been able to establish any right or title to the property in question, therefore, he is not to be entitled to any protection in law against the respondents. Accordingly, I feel that this plea of the petitioner is totally misconceived and the same deserves to be dismissed. However, so far as the action for demolition or retrieval of the possession is concerned, it shall be taken only after 2.4.2015 as by that date, the present session shall come to

an end. Further in order to ensure that there is no discontinuation of the studies of the students. The Director Education, MCD as well as the Director Education, Government of NCT of Delhi shall take all necessary steps to admit the students in other neighbouring government schools so that there is no disruption of their studies.

31. With these observations, the petition is dismissed.

V.K. SHALI, J.

FEBRUARY 03, 2015

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