

\$~

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

% **Date of decision: 22nd April, 2016.**

+ **W.P.(C) 3710/2014 & CM No.7519/2014 (for directions)**

OM PARKASH

..... Petitioner

Through: Mr. Yogesh Jagia and Mr. Amit Sood,
Advs.

Versus

SOUTH DELHI MUNICIPAL CORPORATION Respondent

Through: Mr. Gaurang Kanth and Ms. Biji
Rajesh, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition under Articles 226 and 227 of the Constitution of India
impugns –

- (i) the order dated 10th April, 2013 of the respondent South Delhi
Municipal Corporation (SDMC), in exercise of powers under
Section 349 r/w Section 491 of the Delhi Municipal Corporation
Act, 1957 (MCD Act), directing the petitioner to vacate shop no.3
known as Shakuntalam Beauty Parlor in Block-2, Subhash Nagar,
Delhi for the reason of the said shop having been constructed over

land earmarked for public purpose and the petitioner having unauthorisedly encroached and constructed upon the same; and,

- (ii) the order dated 28th October, 2013 of the Appellate Tribunal, Municipal Corporation of Delhi (ATMCD) of dismissal as not maintainable of appeal under Section 347 B of the MCD Act preferred by the petitioner against the order dated 10th April, 2013 of the respondent SDMC.

2. The petition came up first before this Court on 30th May, 2014 i.e. after nearly six months from the order of the ATMCD and though no notice thereof was issued but the same was being adjourned from time to time. Finally on 28th July, 2015 arguments were heard and judgment reserved. It is the case of the petitioner that the respondent SDMC, after the order dated 10th April, 2013 had also sealed the subject shop; as such the petition is accompanied with an application for interim relief for de-sealing of the shop. However though the petition remained pending before this Court for nearly a year but no interim order was issued. Now that the petition has been finally heard and is being decided, the question of any interim relief does not arise. Written submissions have also been filed by the counsel for the petitioner

and the counsel for the respondent SDMC and the same have also been perused.

3. The facts not in dispute are as under:

- A. On 27th March, 1962 Land & Development Office (L&DO), Government of India handed over a plot of land, on a very small part whereof the shop of the petitioner is situated, meant for use as a public park/for community use, in the residential colony of Subhash Nagar, to the MCD since succeeded by respondent SDMC, for maintenance.
- B. The inhabitants of the residential colony of Subhash Nagar started holding 'Ramlila' on the said plot of land;
- C. Subsequently the residents themselves, without any authority from the L&DO or the respondent SDMC, constructed a Barat Ghar alongwith public dispensary on a part of the said land and on the other part of the land Arya Samaj Mandir came up, while the remaining land continued to be used for holding 'Ramlila' annually.

D. Ramlila Barat Ghar Committee which was managing the Barat Ghar and holding the Ramlila allowed some persons to develop six small shops on the said land by making onetime payment to Ramlila Barat Ghar Committee and the said shops alongwith certain other shops which came up over the said land came to be known as 'Rama Market'. The petitioner is the occupant of shop No.3 in the said 'Rama Market' and is carrying on business of a beauty parlor therefrom; the petitioner claims to have acquired the said shop from one Mr. Bajaj who was earlier carrying on business in the name of Bajaj Electrical Works therefrom and is registered under Delhi Shop and Establishment Act, 1954 and has also obtained licence at the address of the said shop from the respondent SDMC.

E. One Mr. Pramod Talwar resident of the said colony of Subhash Nagar filed WP(C) No.1549/2012 titled ***Pramod Talwar Vs. The Commission , MCD*** in this Court impleading MCD, Police, Chief Fire Officer, Ramlila Barat Ghar Committee and L&DO as respondents thereto and seeking a direction for demolition of the unauthorized construction aforesaid raised on the plot of land

meant for public park/public utility and vide order dated 19th March, 2012 in the said petition, on confirmation by the MCD that the entire construction on the plot was unauthorized and in the form of an encroachment on public land, direction was issued to the SDMC to upon inspection of the construction and if finds that the same has to be demolished, take sealing action with respect thereto after following the due process of law and to thereafter demolition action with respect to the said construction.

F. In compliance of the aforesaid direction, the respondent SDMC in March, 2013 sealed the Barat Ghar/Banquet Hall and on 22nd March, 2013 issued show cause notice to the petitioner and other shopkeepers; though the respondent issued the said show cause notice but the petitioner on 11th April, 2013 was served with the impugned order dated 10th April, 2013 supra directing the petitioner to vacate the premises.

G. The petitioner earlier filed WP(C) No.2539/2013 in this Court impugning the order dated 10th April, 2013 of the respondent SDMC. The said writ petition was disposed of vide order dated 25th April, 2013 accepting the preliminary objection of the counsel

for the respondent SDMC with regard to the maintainability of the writ petition on the ground of an equally efficacious remedy before the ATMCD being available to the petitioner and by relegating the petitioner to the ATMCD.

H. The petitioner in accordance with the direction aforesaid approached the ATMCD which has vide the impugned order dated 28th October, 2013 held the appeal to be not maintainable reasoning –

- i. that the petitioner being an encroacher over public land was not required to be served with any show cause notice as had been served on him, not even in compliance of the order dated 19th March, 2012 in WP(C) No.1549/2012 which was directed only against Ramlila Committee and not against the petitioner;
- ii. that the ATMCD has power to deal only with the appeal against sealing action carried out by exercising the powers under Section 345A of the MCD Act i.e. where question of unauthorized construction is involved. Section 345A cannot be invoked for the purpose of taking sealing action qua encroachment on Government land.

- iii. that the proceedings of the MCD preceding the sealing action were also relating to the Barat Ghar only;
- iv. when no power under Section 345A of the MCD Act had been exercised by the respondent SDMC, the Tribunal had no jurisdiction to entertain the appeal under Section 347B of the Act.
- v. that remedy of the petitioner for the relief of de-sealing of the premises sealed on account of being encroachment on government land was elsewhere.
- vi. the petitioner, in response to the preliminary objection of the respondent SDMC in WP(C) No.2539/2013 earlier filed by the petitioner, ought to have contended that the ATMCD had no jurisdiction and was thus not the alternative efficacious remedy and which the petitioner failed to do;
- vii. that the petitioner could not maintain an appeal, on the basis of the order of the High Court, which was otherwise not maintainable and not within the jurisdiction of the ATMCD;

and disposed of the appeal giving liberty to the petitioner to challenge the sealing action before the appropriate forum.

4. In the factual scenario aforesaid, the petitioner, though had the remedy against the order of ATMCD before Hon'ble The Lieutenant Governor (and which as per the judgment of the Supreme Court in *Amrik Singh Lyallpuri Vs.UOI* (2011) 6SCC 535 is to be exercised by the District Judge) but has preferred this petition.

5. Finding that the petitioner admittedly has no title to the shop or to the land underneath the shop, and the Supreme Court having held that the High Courts have to ensure that its jurisdiction under Article 226 of the Constitution of India is not abused by land grabbers to perpetuate their possession of the land, it was straightway enquired from the counsel for the petitioner as to why the equitable jurisdiction of this Court under Article 226 of the Constitution of India should be allowed to be invoked by the petitioner who admittedly is a trespasser over the public land.

6. The counsel for the petitioner though not disputing/controverting that the shop aforesaid of the petitioner is an encroachment over public land meant for a public park or a public utility contended that since the petitioner

has been in possession thereof since 1975-76, he has become the owner by adverse possession and cannot be dispossessed therefrom.

7. On further inquiry as to how the claim of the petitioner to have become owner by adverse possession which necessarily entails adjudication of issues of fact which cannot be undertaken in writ jurisdiction can be subject matter of decision in a writ petition, the counsel for the petitioner contended that he has no other remedy available to him and it is for the respondent SDMC or the L&DO to institute proceedings by way of a suit for recovery of possession from the petitioner and in which suit the petitioner would be able to take a defence of adverse possession. Reliance was placed on *Gurdwara Sahib v. Gram Panchayat Village Sirthala* (2014) 1 SCC 669 laying down that declaration of ownership of land on the basis of adverse possession cannot be sought by the plaintiff but claim of ownership by adverse possession can be made by way of a defence, when arrayed as defendant in proceedings and it was contended that the petitioner being in possession was not required to file a suit for declaration having become owner by adverse possession.

8. In addition, the following propositions were urged by the counsel for the petitioner:

- I. that the respondent SDMC through executive summary action cannot take possession of the property possessed by the petitioner for more than 40 years. Reliance in this regard was placed on (a) ***Express Newspapers Pvt. Ltd vs. Union of India*** (1986) 1 SCC 133; (b) ***Government of Andhra Pradesh Vs. Thummala Krishna Rao*** (1982) 2 SCC 134; (c) ***State of Rajasthan Vs. Padmavati Devi (Dead) by LRS***. 1995 Supp (2) SCC 290; (d) ***DMC Ltd. Vs. Delhi Development Authority*** 2013 Indlaw Del 765.
- II. no sealing could have been effected without passing an order of sealing and which admittedly has not been passed. Reliance was placed on ***Unique Innovation Private Ltd. Vs. MCD*** 2011 Indlaw DEL 207;
- III. that the ATMCD could not, in view of the order dated 25th April, 2013 in WP(C) No.2539/2013 earlier filed by the petitioner relegating the petitioner to the ATMCD, have held that it did not have jurisdiction.
- IV. Reference was made to ***State of Haryana Vs. Mukesh Kumar*** (2011) 10 SCC 404 generally on the law of adverse possession.

9. Per contra, the counsel for the respondent SDMC contended :

- I. that the writ petition is not maintainable as the remedy of appeal to the District Judge under Section 347D of the MCD Act is available against the order of the ATMCD.
- II. that the respondent SDMC has taken the impugned action in accordance with the order dated 19th March, 2012 in WP(C) No.1549/2012 filed by Mr. Pramod Talwar aforesaid.
- III. that the residential colony of Subhash Nagar was developed almost 50 years ago by the L&DO and open areas therein were handed over to MCD for maintenance; as per the layout plan, the area under dispute is vacant land and the same is public land;
- IV. that the show cause notice was issued to petitioner and upon petitioner not showing any lawful title to the property, the impugned order dated 10th April, 2013 directing him to vacate the premises was passed.
- V. that mere occupation of land is not sufficient to create any right which is adverse to the government. Reliance in this regard was

placed on *R. Hanumaiah Vs. Secretary, Govt. of Karnataka* (2010) 5 SCC 203.

VI. that the respondent SDMC has a statutory duty under the MCD Act to remove encroachments upon public land. Reliance in this regard was placed on *Asharfi Lal Vs. UOI* 161 (2009) DLT 277;

VII. that the respondent SDMC is within its right to deal with such encroachment in accordance with DMC Act. Reliance was placed on *Chandni Chowk Sarv Vyapar Mandal (Regd.) Vs. MCD* 124(2005) DLT 51 and *Pitam Pura Sudhar Samiti Vs. UOI* (2002) ILR 2 Delhi 393.

VIII. that this Court in order dated 10th April, 2013 in contempt case No. 125/2010 titled *Rakesh Jain Vs. NDMC* has held that Municipal Authority has a right to remove encroachment from public areas, public ways and open areas without a show cause notice.

10. I will first take up the challenge to the impugned order dated 28th October, 2013 of the ATMCD alongwith the objection of the respondent SDMC as to the maintainability of this petition on the ground of the remedy of appeal to the District Judge under Section 347D of the MCD Act being

available against the order of the ATMCD. The impugned order dated 10th April, 2013 of the MCD is not of sealing but in exercise of power under Section 349 of the MCD Act, directing the petitioner to vacate the property. Section 349 empowers the Commissioner of the Municipal Corporation to, by an order in writing, direct that any building which in his opinion is in a dangerous condition or is not provided with sufficient means of egress in case of fire or is occupied in contravention of Section 346 be vacated forthwith or within such period as maybe specified in the order. Section 346 deals with completion certificates and prohibits occupation of a property without completion certificate. An order under Section 349 has not been made appealable before the ATMCD which is constituted to hear appeals preferred under Section 343 or Section 347B of the Act. Under Section 343, the order is of demolition or stoppage of buildings and other works commenced without sanction or contrary to sanction while an order under Section 347B can be of a varying nature as enunciated in Clauses (a) and (b) of sub-section 1 thereof. The same also does not mention an order under Section 349, as the impugned order dated 10th April, 2013 is. Thus, no error can be found with the impugned order dated 28th October, 2013 of the ATMCD, holding the appeal preferred by the petitioner to be not

maintainable before it. Once the appeal before ATMCD was not maintainable, the question of second appeal under Section 347D before the District Judge does not arise.

11. That takes me to the effect of the order dated 25th April, 2013 in WP(C) No.2539/2015 earlier filed by the petitioner impugning the order dated 10th April, 2013 and relegating the petitioner to the ATMCD. It is the settled proposition of law that an order of a Court cannot confer jurisdiction in a fora or in a Tribunal which it otherwise does not have. Reference if any required can be made to *Satya Prakash Vs. State of U.P.* (2000) 9 SCC 421.

12. Even otherwise I find that this Court in the order dated 25th April, 2013 in WP(C) No.2539/2015 proceeded on the premise that the order impugned in the petition was an order of sealing of the property and against which the counsel for the respondent SDMC contended an appeal to be maintainable before the ATMCD. The counsel for the petitioner did not contend that the order being under Section 349 was not appealable and merely contended that the remedy before ATMCD was not efficacious remedy since the respondent SDMC in passing the order dated 10th April, 2013 impugned therein had acted in terms of the order dated 19th March, 2012 in WP(C) No.1549/2012 filed by Mr. Pramod Talwar. The said

objection of the petitioner was taken care of by clarifying that the ATMCD will proceed to hear the appeal uninfluenced by any observation in the order dated 19th March, 2012 in the writ petition filed by Mr.Pramod Talwar. This Court thus had no occasion to consider the maintainability of the appeal before the ATMCD against the order under Section 349 of the MCD Act and on consideration of which question the ATMCD has rightly held the appeal to be not maintainable.

13. That brings me to the question of the relief if any to which the petitioner is entitled to in this petition.

14. The respondent SDMC has asked the petitioner to vacate the property, after giving an opportunity to the petitioner to show his title if any to the property and has sealed the property, because of the land being in custody and management of respondent SDMC and being meant for use as a public park/public utility and the petitioner having no right title or claim thereto. To the said extent it is not disputed by the petitioner also that i) the land belongs to the Government of India; ii) that the respondent SDMC is in custody and management thereof; iii) that it is meant for public park/public utility; and, iv) that the petitioner is in encroachment thereof. Ordinarily when a municipal or other public authority is seeking to remove

encroachments/trespassers from public land, not without notice but after giving an opportunity to show title, the question of this court intervening would not arise. In fact the Supreme Court from time to time has been issuing direction for removing encroachment from community lands. Reference can be made to (i) *M.C. Mehta Vs. UOI* (2003) 10 SCC 619, (ii) *Madhavrao Scindia Vs. Ramesh Jatav* (2006) 1 SCC 379; (iii) *K.K. Mutreja Vs. UOI* (2010) 15 SCC 774 and (iv) *Union of India Vs. State of Gujrat* (2011) 14 SCC 62. One citizen, by appropriating public land meant for benefit of all/society, by approaching the Court cannot perpetuate his/her unauthorized illegal possession.

15. However the petitioner in the present case claims to have become owner by adverse possession. The question of adverse possession as I have already observed above is a question largely of fact and which cannot be adjudicated in a writ petition. The question which thus arises is whether in this writ petition the court should injunct the respondent SDMC from forcibly dispossessing the petitioner by resorting to sealing of the property and leave the respondent SDMC / Union of India to take proceedings either under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 or before the Civil Court for recovery of possession of the property from the

petitioner and in which proceedings the petitioner can set up a defence of adverse possession. Though that may be a suitable course of action in a case where the Court finds disputed issues of fact requiring adjudication by examination and cross examination of witnesses to be arising; I do not find the present to be such a case. The plea/claim of the petitioner of having become owner by adverse possession is bereft of the essentials of adverse possession.

16. Supreme Court, in *Konda Lakshmana Babuji Vs. Government of A.P.* (2002) 3 SCC 258 has held that to be able to succeed in a claim of adverse possession, which essentially is a claim of extinction of title of the lawful owner, it is essential for the person claiming to be in adverse possession to have publicly claimed adversely to the rightful owner and should have had *animus possidendi* and displayed a clear and unequivocal assertion to title to the land adversely to the true owner. I do not find the petitioner to have made any plea of claiming adversely to the respondent SDMC or to Union of India at any time lest for a continuous period of 30 years.

17. The petitioner as aforesaid admits to the ownership of Union of India of the land, with the entrustment thereof to the respondent SDMC for

maintenance and of the encroachment thereon. The petitioner has nowhere claimed that he or his predecessor i.e. Mr. Bajaj at any point of time asked for the land to be recorded in their names or at any place declared themselves as owners. So much so that no document by which ‘Ramlila Committee’ which had first trespassed over the land is claimed to have allowed some persons to raise construction has been placed on record. No document of transfer of the subject shop by Mr. Bajaj in favour of the petitioner has been placed on record. All that the petitioner claims is possession/occupation of the property. It is a settled principle that mere long possession, for howsoever long it may be, does not confer any right or title in the property. Reference in this regard can also be made to ***Roop Singh Vs. Ram Singh*** (2000) 3 SCC 708 Thus, merely because the petitioner may have been in occupation and use of the subject shop would not confer any title in the petitioner with respect thereto, not even by way of adverse possession. The claim of the petitioner of having obtained licence from the respondent SDMC at the address of the shop in his name and/or of having obtained other amenities in the shop would also not tantamount to the petitioner openly declaring himself to be the owner of land underneath the shop without the petitioner having openly declared himself as the owner adversely to Union of

India/respondent SDMC. The petitioner, so looked at, has no plausible claim of having become owner by adverse possession. In fact Supreme Court in ***Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan*** (2009) 16 SCC 517 and ***State of Haryana Vs. Mukesh Kumar*** (2011) 10 SCC 404 has gone to the extent of holding the law of adverse possession to be irrational, illogical and wholly disproportionate and the plea of adverse possession to be a highly iniquitous one.

18. There thus, according to me, is nothing for decision by the Civil court or by the Estate Officer under the Public Premises Act for this Court to adopt the course of action of restraining the respondent SDMC from summarily taking over possession and relegating it to the Civil Court or to the Estate Officer. This Court cannot be unmindful of the fact that when such an order relegating the parties to a Civil Court or in an Estate Officer is passed, the said proceedings go on for years and during which time, while the petitioner will continue in occupation of the public property, the public would be deprived of the beneficial use thereof. The considerations when a private interest is pitted against public interest are entirely different as held as far back as in ***The State of Punjab Vs. Sodhi Sukhdev Singh*** AIR 1961 SC 493. The loss to the public cannot ordinarily be measured in terms of money as

opined by the Supreme Court in *Oil & Natural Gas Corporation Vs. SAW Pipes Ltd.* (2003) 5 SCC 705 and reiterated in *Construction and Design Services Vs. Delhi Development Authority* MANU/SC/0099/2015.

19. I therefore do not find any merit in the petition and dismiss the same with direction to the respondent SDMC to forthwith demolish the property and secure the land underneath the same and with costs of Rs.25000/- payable by the petitioner to respondent SDMC.



RAJIV SAHAI ENDLAW, J.

APRIL 22, 2016
M..