

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

+ W.P.(C) 4041-42/2006

Reserved on: 21.03.2017

Date of decision: 10.04.2017

IN THE MATTER OF:

M/S KOLMET ENTERPRISES

..... Petitioner

Through: Mr. S.K. Maniktala, Advocate with
Mr. Vinod Kumar, Advocate.

versus

NEW DELHI MUNICIPAL COUNCIL

..... Respondent

Through: Mr. Jitendra Kumar Tripathi, proxy
counsel for Ms. Sakshi Popli, Advocate.

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J.

1. The petitioner is aggrieved by the order dated 15.2.2016, passed by the Lieutenant Governor, Govt. of NCT of Delhi allowing the second appeal filed by the respondent/NDMC under Section 256 of the New Delhi Municipal Council Act, 1994 (in short '**the NDMC Act**') against an order dated 16.8.2015 passed by the Appellate Tribunal, MCD/NDMC (hereinafter referred to as the ATMCD) whereunder, the demolition order dated 7.6.2005 passed by the Chief Architect, NDMC in respect of the

alleged unauthorized construction existing at the backside of Host Restaurant, F-8, Connaught Place, New Delhi, was set aside.

2. The facts leading to filing of the present petition, as gleaned from the petition, are that on 30.5.1978, the petitioner had taken on lease, the subject premises for running a restaurant under the name and style of 'Host Restaurant'. At that time, in addition to two permanent kitchens in the subject premises, there existed a temporary kitchen behind the building, which was not a part of the tenanted premises. On 11.2.1983, the Medical Officer of Health and Licencing Authority, NDMC inspected the kitchen of the subject premises and served a notice dated 8.3.1983 on the petitioner pointing out several defects and the unhygienic condition prevailing in the kitchen. In para 1 of the said notice, a mention was made of a temporary kitchen in addition to the licensed kitchen where food articles were being cooked under unhygienic conditions and it was noted *inter alia* that the temporary kitchen was not completely fly-proof and flies were noticed inside. Directions were issued to the petitioner to shutdown the temporary kitchen or seek approval for operating the same under the relevant bye-laws.

3. The petitioner had replied to the aforesaid notice, vide letter dated 10.6.1983, and stated *inter alia* that they had removed all the defects that had been pointed out and a request was made to the authorities to undertake fresh inspection of the premises. The matter rested there till the year 1997 when the Chief Architect, NDMC served on the petitioner, a notice to show cause dated 8.8.1997 which stated that unauthorized construction had been

raised in the subject premises without obtaining the requisite approval under the Building Bye Laws, and the same was liable to be sealed under Section 250 of the NDMC Act. The petitioner was required to give a reply within five days as to why the proposed action should not be taken by the respondent/NDMC. The following were details of the unauthorized constructions mentioned in the notice to show cause dated 8.8.1997:-

“Covered area m.a. 22’x20’ and 15’x10’ with the help of ACC sheets at open area back side of Host Restaurant, F-B, Connaught Place, New Delhi.”

At the bottom of the notice to show cause, was a hand drawn site plan to indicate the location of the temporarily covered area.

4. Vide reply dated 19.8.1997, the petitioner responded to the aforesaid notice to show cause, denying that there existed any unauthorized construction and asserted that the temporary structure in question is very old. To demonstrate that even as per the respondent/NDMC, a temporary kitchen was in existence for several years, reference was made to the earlier notice dated 8.3.1983 issued by the Medical Officer, Health NDMC. The petitioner stressed that they had remained in possession of the subject premises since the year 1978 and submitted three certificates issued by neighbours, who claimed to have attended the opening ceremony of the restaurant, and stated that the temporary structure in question was existing at the back of Host Restaurant from the date the said restaurant had been inaugurated on 4.2.1979. After receiving the aforesaid reply, the respondent/NDMC remained silent for almost eight years, till the matter

was reopened on 7.6.2005, when the respondent/NDMC proceeded to issue an order under Section 247 of the NDMC Act holding that the temporary structure in question was unauthorized and liable to be demolished and the reply submitted by the petitioner was not found to be satisfactory. As a result, the petitioner was called upon to demolish the said structure within one week.

5. Aggrieved by the aforesaid decision, the petitioner preferred an appeal under Section 256 of the NDMC Act before the Appellate Tribunal, MCD/NDMC. Vide order dated 16.8.2005, the Appellate Tribunal allowed the said appeal and held that the date of the alleged unauthorized construction had not been disclosed by the respondent/NDMC either in the notice to show cause or in the impugned order dated 7.6.2005 and the onus of proving the said fact lies with the respondent/NDMC, which they had failed to discharge. The Appellate Authority alluded to the extant statute, namely, the Punjab Municipal Act, 1911 and referred in particular to Section 195 thereof which prescribes the penalty for disobedience. The said provision is reproduced herein below for ready reference :

*“195. **Penalty for disobedience:** - Should a building be begun, erected or re-erected.*

(a) without sanction as required by section 189 (1); or

(b) without notice as required by section 189 (2); or

(c) when sanction has been refused;

the [committee] may by notice delivered to the owner within six months from the completion of the building, require the building to be altered or demolished as it may deem necessary

within the period specified in such notice; and should it be begun or erected.

(d) in contravention of the terms of any sanction granted; or

(e) when the sanction has lapsed; or

(f) in contravention of any bye-law made under section 190; or in the case of a building of which the erection has been deemed to be sanctioned under section 193(4), if it contravenes any scheme sanctioned under section 192;

the [committee] may by notice to be delivered to the owner within six months from the completion of the building require the building to be altered in such a manner as it may deem necessary, within the period specified in such notice:

Provided that the committee may, instead of requiring the alteration or demolition of any such building, accept by way of compensation such sum as it may deem reasonable:

Provided also that the committee shall require a building to be demolished or altered so far as is necessary to avoid contravention of a building scheme drawn up under section 192:

Provided further that if any notice is issued by the Executive Officer under this section on the ground that a building has been begun or has been erected in contravention of the terms of any sanction granted or in contravention of any bye-law made under section 190 the person to whom the notice is issued may, within fifteen days from the date of service of such notice, appeal to the committee, and subject to the provisions of sections 225, 232 and 236, the decision of the committee shall be final.” (emphasis supplied)

6. Holding that under Section 195 of the Punjab Municipal Act, 1911, the respondent/NDMC was under an obligation to demolish a building upon a notice being delivered to the owner, within a period of six months from the completion of the unauthorized construction, and observing that it

had failed to do so in the present case by specifically mentioning in the notice to show cause, the date on which the alleged unauthorized construction had come into existence, the petitioners' appeal was allowed and the impugned demolition order dated 07.6.2005 was set aside with a rider that the respondent/NDMC will be at liberty to initiate proceedings against the unauthorized construction if it has documentary evidence to substantiate the above date.

7. The decision of the Appellate Authority was assailed by the respondent/NDMC in a second appeal filed before the Lieutenant Governor, Govt. of NCT of Delhi, which was allowed vide order dated 15.2.2006. Aggrieved by the said decision, the petitioner has filed the present petition.

8. Mr. Maniktala, learned counsel for the petitioner submitted that the impugned judgment is erroneous inasmuch as it failed to notice that the temporary kitchen in question was being run at the back side of the subject premises from the year 1979 onwards, which is apparent from a perusal of the notice dated 8.3.1983 issued by the Medical Officer, Health NDMC and the said document is a conclusive proof of the existence of the temporary structure. He adverted to the provisions of Section 195 of the Punjab Municipal Act, 1911 and argued that the temporary construction is covered by the Punjab Municipal Act, 1911 and not by the NDMC Act and once Section 195 of the Punjab Municipal Act, 1911 contemplates that no action can be taken after six months of the existence of the structure, any attempt on the part of the respondent/NDMC to take action under the

NDMC Act, after a lapse of 18 years reckoned from the date when the construction had come into existence and 7 years after the date of issuance of the notice to show cause dated 8.8.1997, is patently illegal and arbitrary. To fortify his submissions, learned counsel had cited the following decisions :

1. MCD vs. Surjit Kaur, **1973 AIR (Del.) 198**,
2. Masonic Club vs. MCD & Ors., **91 (2001) DLT 149**,
3. Jor Bagh Association (Regd.) vs. UOI, **2004 AIR(Del.) 389**, and
4. H.K. Choudhary vs. NDMC, **2008 (155) DLT 267**.

9. It may be noted here that arguments were addressed in the present case by learned counsel for the petitioner on 21.3.2017. After about forty minutes into the arguments, learned proxy counsel for the respondent/NDMC had turned up and sought to explain his absence on the ground that he was held up before another Bench. When he was called upon to address arguments in reply, he had expressed his inability to do so. While reserving judgment, in the interest of justice, learned counsel for the respondent/NDMC was granted two working days to submit written submissions with a copy to the other side. On 24.3.2017, Ms. Popli, learned counsel for the respondent/NDMC had mentioned the present matter in the presence of the other side and requested for further time of one week to file the written submissions. While declining to extend the time by one week, she was granted time upto 27.3.2017 to submit the written submissions.

However, written submissions were not filed on behalf of NDMC till the court closed for one week, on 02.4.2017.

10. Records reveal that respondent/NDMC did not file a counter affidavit in reply to the present petition. However, the petitioner did annex with the petition, a copy of the second appeal preferred by the respondent/NDMC before the Lieutenant Governor, GNCTD for assailing the order dated 16.8.2005 passed by the ATMCD/NDMC. This court has therefore culled out the pleas taken by the respondent/NDMC in the second appeal to assail the order dated 16.8.2005 passed by the ATMCD. In the appeal, it has been stated by NDMC that the impugned notice to show cause dated 8.8.1997 furnishes all the relevant details of the temporary construction existing at the subject premises and due opportunity was given to the petitioner to submit a reply. Only after examining the petitioner's reply was the order dated 7.6.2005 passed by the Chief Architect, NDMC directing demolition of the unauthorized construction.

11. As for the notice dated 8.3.1983 issued by the Medical Officer of Health and Licencing Authority, NDMC, the respondent/NDMC took a stand that the said notice was issued in connection with a temporary kitchen situated at the back of Host Restaurant and it referred to the unhygienic conditions prevailing therein for preparation of food, etc., but nowhere in the said notice was there any description of the unauthorized construction for it to be treated as identical to the construction that finds mention in the notice to show cause dated 8.8.1997 and the demolition order dated 7.6.2005. Reference has also made by the NDMC to the reply

of the petitioner dated 10.6.1983 in response to the notice dated 8.3.1983, to urge that they had cleverly avoided stating anything with regard to the temporary kitchen whereas they are now trying to rely on the same set of documents to demonstrate that the unauthorized construction is very old only to take advantage of the protection available under the Punjab Municipal Act, 1911.

12. The Respondent/NDMC had also questioned the genuineness of three certificates issued by Shri Gulab Bhawani, M/s Kailash Carpet Co. and M/s Pandit Brothers (neighbours) and relied on by the petitioner to show that the temporary kitchen had existed at the back of the premises since the year 1979. Respondent/NDMC contended that the said certificates are of no value and could not be relied upon till the persons issuing them were summoned and examined.

13. The respondent/NDMC has also taken a plea in their second appeal that the ATMCD had erred in fixing the responsibility of proving the age of the unauthorized construction on the NDMC and had wrongly concluded that the show cause notice/demolition order did not contain the complete and the relevant facts. It was urged by NDMC that even the notings in the department file dated 1.8.1997 and 29.8.1997 and relied on by the petitioner, would not be of any assistance as no conclusions could be drawn therefrom.

14. The only question that engages this court is whether the construction, subject matter of the demolition of the order dated 07.6.2005, preceded by a notice to show cause dated 08.8.1997, is protected under the Punjab

Municipal Act and if so, could it have been demolished by the respondent/NDMC. The contention of the learned counsel for the petitioner is that the construction in question is very old and was raised prior to coming into force of the NDMC Act, in the year 1994. As per the petitioner, at that time, Punjab Municipal Act was in force and the said construction is saved under the provision of Section 195 for the reason that the respondent/NDMC did not issue a notice of demolition within six months from the date of raising the said construction.

15. On the other hand, the consistent stand of the respondent/NDMC before the ATMCD and in the second appeal has been that the construction in question does not enjoy the protection of the Punjab Municipal Act and the NDMC is well empowered to take demolition action under Section 247 of the NDMC Act.

16. On examining the documents filed by the petitioner and referred to herein above, it is quite apparent that a temporary kitchen was in existence behind the subject premises in the year 1983, as the same was pointed out by the Medical Officer Health Department, NDMC in the notice dated 08.3.1983. Though details of the nature of the construction existing at that point in time were not specified in the captioned notice, the same did acknowledge the existence of a temporary kitchen behind the building, in addition to the licensed kitchen. That being the position, it cannot be urged by the respondent/NDMC that the entire construction subject matter of the notice to show cause dated 08.8.1997, had come into existence after enactment of the NDMC Act, 1994. This being the factual background, it is

considered necessary to examine as to whether it was necessary for the petitioner to give a notice of completion of construction activities for seeking protection of the construction raised prior to the year 1994, for claiming the protection available under Section 195 of the Punjab Municipal Act.

17. Section 195 postulates that if the building has begun, been erected or re-erected without necessary sanctions; or on refusal of sanction, the Committee shall deliver a notice to the owner within six months from the date of completion of the building, and require the owner to alter/demolish, the same within a period specified in such a notice. Further, the said provision contemplates that should a building be begun or erected in contravention to the terms of any sanction granted, or after the sanction has lapsed, or in contravention of any of the bye-law/scheme of sanction, then the Committee may deliver a notice to the owner within six months from the completion of the building, requiring the building to be altered, as may be necessary within a period specified in such a notice.

18. The scheme of Section 195 and the effect of the said provision came up for discussion in the case of Surjit Kaur (supra). In the said case, the respondent had erected a building in the year 1957 without obtaining any sanction from the Municipal Authorities. The Municipal Corporation of Delhi served a notice of demolition of the said premises. Aggrieved by the said demolition order, the respondent therein instituted a suit for permanent injunction which was dismissed by the learned trial court. The respondent then filed an appeal wherein the judgment of the trial court was overturned.

Aggrieved by the said decision, MCD filed a second appeal before the High Court, wherein the legal question framed was as to whether the MCD was entitled in law to issue a notice of demolition. It was noticed in the said decision that the Punjab Municipal Act, 1911 was applicable to the areas in question till the Delhi Municipal Act came into force on 09.4.1958. The appellant/Corporation therein had invoked Section 343 of DMC Act and had contended that the notice of demolition could be issued at any time after completion of the building without any limitation of time. After examining the rights and obligations cast on the Municipal Corporation, flowing from the Punjab Municipal Act, which was succeeded by the Delhi Municipal Corporation Act, it was held that MCD would be bound by the liability of its predecessor Municipalities, in the light of Section 516 of DMC Act.

19. In the captioned case, after carefully examining the provision of Section 195 of the Punjab Municipal Act, the Court had interpreted the same in the following manner:-

“4.Admittedly, the building in question was erected without the requisite sanction and, therefore, if the Punjab Act had continued to apply, the Municipality would have been entitled to require the respondent to demolish the said building. The first appellate Court has not given any finding as to the exact date or time when the building was constructed by the respondent other than saying that it was constructed in 1957. Taking the last day of the year 1957 to be the day when the building was constructed, the Municipality, if it had continued, could have served the notice of demolition under the aforesaid section by or before June 30, 1958.

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6. *It is no doubt true that a liability was incurred by the respondent under section 195 of the Punjab Act to demolish the building upon a notice being delivered to her but this liability would have been incurred only if a notice had been delivered to her within six months from the completion of the building and that is the extent of the liability incurred by her. The liability was conditional upon a notice being delivered to her within six months from the completion of the building and it cannot be said to be a liability incurred without any limit of time. The Corporation cannot take advantage of the fact that in section 343 of the Corporation Act, there is no limit of time for the service of a notice of demolition because the Corporation can enforce only such liabilities which have been incurred under the Punjab Act and to determine the extent and nature of the liability, the provisions of the Punjab Act will have to be looked into notwithstanding its repeal. The provisions contained in sections 336, 343 and 344 of the Corporation Act are, by their language, of prospective operation and the appellant Corporation cannot rely upon these provisions to issue a notice of demolition after the expiry of six months from the completion of the building as was done in the present case in the year 1960.*

(7) It may be that a period of six months had not expired between the completion of the building and the coming into force of the Corporation Act. If the Corporation wanted to exercise the power of demolition by reason of clause (b) of sub-section (2) of section 516 of the Corporation Act, they ought to have acted within six months from the completion of the building and having failed to do so, they had no right to take action after the expiry of six months. Upon the expiry of six months from the completion of the building, no liability remained upon the respondent to have the building demolished as the liability ceased to remain a liability upon the expiry of this period.”
(emphasis added)

The decision in the case of Surjit Kaur (supra), was followed as a precedent in the cases of Jor Bagh Association (supra) and H.K. Choudhary (supra).

20. Coming to the facts of the case at hand, there is no quarrel with the proposition that the respondent/NDMC would have been well entitled to require the petitioner to demolish the construction undertaken by it without the requisite sanction, but the same could have been done only if a notice of demolition was served on the petitioner within six months from the date of completion of the said construction. Thus, unlike Section 247 of the NDMC Act, 1994 where there is no timeline fixed for the respondent/NDMC for service of a notice of demolition, a specific timeline was prescribed in Section 195. The NDMC Act, 1994 was enacted on 14.7.1994 and the provisions contained in Chapter XIV thereof that relates to "*Building Regulations*", provide for prohibition of building without sanction, erection of building, application for additions to, or repairs of buildings, sanction or refusal of erection of building, order of demolition and stoppage of erection of any buildings etc. are all prospective in nature. None of the said provisions can be invoked by the respondent/NDMC to issue a notice of demolition after expiry of six months from the date of completion of the erection without sanction, when the notice itself does not mention the date on which erection of the un-authorized construction was undertaken.

21. It may be noted here that Section 416 of the NDMC Act, 1994 that provides for repeal and savings is in *pari materia* with Section 516 of the Delhi Municipal Corporation Act, discussed in the case of Surjit Kaur (supra). Section 416 postulates that from the date of establishment of the Council, the Punjab Municipal Act, 1911 as applicable to New Delhi, shall cease to have effect within New Delhi. Section 416 (2)(b) provides that notwithstanding the provisions of sub-section (1), all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with or for the New Delhi Municipal Committee before the establishment of the Council, shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Council under this Act. In other words, if the respondent/NDMC wanted to exercise the powers of demolition by invoking the provision of Section 416 (2) (b) of the NDMC Act, 1994, then it ought to have taken action within a period of six months from the date of completion of the building, as contemplated in Section 195 of the Punjab Municipal Act, which it has failed to take in the present case.

22. Given the fact that the notice issued by the Health Department of the respondent/NDMC in the year 1983 when the Punjab Municipal Act was in force, refers to a temporary kitchen behind the main building, it cannot be argued that a notice could be issued by the NDMC after enactment of the NDMC Act, 1994, thereby calling upon the owner to demolish the very same unauthorized construction. On expiry of a period of six months from the date of completion of the construction in question, the petitioner stands

exonerated from the liability to undertake any demolition activity, as contemplated in Section 195 of Punjab Municipal Act.

23. As a result, this Court is inclined to concur with view expressed by the ATMCD that upon expiry of six months from the date of completion of the building, no liability remains for the petitioner to have the building demolished as such a liability ceased to remain a liability after expiry of six months. Further, in the case of Masonic Club (supra) it was clearly held that a notice to show cause must contain the relevant description of the unauthorized construction including the date of construction, the area of unauthorized construction, its measurement etc. and in the absence of the material particulars, the notice to show cause has no value in the eyes of law. On a perusal of the notice to show cause in the present case, it is manifest that the respondent/NDMC failed to give the material particulars with regard to the date/year of the construction and has only given the measurement of the construction.

24. Moreover, the notice to show cause was issued in the year 1997 whereas, the demolition order came to be passed on 07.6.2005. There is no explanation worth the name offered by the respondent/NDMC for keeping the said notice to show cause pending for eight long years. Even if three certificates submitted by the petitioner are discarded on the ground that they are self serving and of doubtful veracity, the notice dated 08.3.1983, issued by none other than the Health Department, NDMC, cannot be overlooked when it comes to assessing the date of completion of or the vintage of the temporary structure in question.

25. As a result, the impugned order dated 15.2.2006 passed by the second Appellate Authority cannot be sustained and is set aside and the order dated 16.8.2005 passed by the Appellate Tribunal, MCD is restored. Axiomatically, the impugned demolition order dated 07.6.2005, passed by the respondent/NDMC is unsustainable and is quashed and set aside. At the same time, liberty is granted to the respondent/NDMC to initiate proceedings for demolition of the subject unauthorized construction, if it is in possession of documentary evidence to demonstrate that the said construction was erected after the NDMC Act, 1994 came to be legislated.

26. In view of the peculiar facts and circumstances of the case, the parties are left to bear their own expenses.

(HIMA KOHLI)
JUDGE

APRIL 10, 2017

sk/ap